Petition

81-164

No.

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Supreme Court of the United States

October Term, 1981

CITY OF PAINESVILLE, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Upon determining that a municipal utility boiler is not in compliance with New Source Performance Standards, promulgated pursuant to Section 111 of the Clean Air Act, should the district court, under this Court's decision in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), first conduct an evidentiary hearing and determine the potential legal and equitable remedies available and the propriety and efficacy of each before permanently enjoining operation of the boiler in violation of such standards?

2. When a proposed New Source Performance Standard promulgated under Section 111 of the Clean Air Act is subsequently held to have been defective at the time of its proposal, does the date of publication nevertheless constitute the date for determining which sources are subject to such standard, even though the standard can subsequently be justified only on the basis of technology developed after the date of publication?

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Supreme Court of the United States

October Term, 1981

CITY OF PAINESVILLE, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The City of Painesville, Ohio, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on March 26, 1981, in Case No. 78-3551, affirming a decision and orders of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The decision and opinion of the court of appeals, entered on March 26, 1981, and not yet officially reported, appears in the appendix to this petition, as does the court's April 29, 1981, order denying rehearing. The January 9, 1977, Memorandum and Order of the district court is reported at 431 F. Supp. 496. The June 18, 1978, Order is unreported. Both district court decisions appear in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The opinion below was entered on March 26, 1981, and an order denying a petition for rehearing was filed on April 29, 1981.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Section 111 of the Clean Air Act, as added by §4(a) of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and originally codified at 42 U.S.C. §1857c-6 (later amended and recodified at 42 U.S.C. §7411) is reproduced in pertinent part in the appendix.

B. Section 113(b) of the Clean Air Act, as added by §4(a) of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and originally codified at 42 U.S.C. §1857c-8(b) (later amended and recodified at 42 U.S.C. §7413(b)) provides, in pertinent part:

> "The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person . . . violates section 111(e) . . ."

C. 40 C.F.R. Part 60, as added by 36 Fed. Reg. 24877 (December 23, 1971), is reproduced in pertinent part in the appendix.

STATEMENT OF THE CASE

A. The course of proceedings and their disposition in the courts below

On April 2, 1976, the United States of America, at the request of the United States Environmental Protection Agency ("EPA"), filed a complaint, along with a motion for preliminary injunction, with the United States District Court for the Northern District of Ohio, requesting that the City of Painesville (the "City" or "Painesville"), a municipal corporation, be enjoined from operating Unit 5 of the Painesville Municipal Light Plant in violation of Section 111(e) of the Clean Air Act (the "Act"),[1] and the Standards of Performance for New Stationary Sources (commonly called "New Source Performance Standards" or "NSPS") for sulfur dioxide, promulgated thereunder and codified at 40 C.F.R. Part 60. The jurisdiction of the district court was invoked under 28 U.S.C. §1345 and 42 U.S.C. §1857c-8(b)(3) (later amended and recodified at 42 U.S.C. §7413(b)(3)).

On April 23, 1976, the City responded by filing a motion for summary judgment for the reason that Unit 5 was not, under the statute and regulations, a "new source" subject to the NSPS for sulfur dioxide. On July 30, 1976, the government filed its own "Motion for Summary Judgment as to Liability," contending that Unit 5 is a "new source" as defined in Section 111(a)(2) of the Act. The government sought only to determine the issue of liability and advised the court that facts relating to remedy were

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1. References herein are to Section 111 of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Section 111 was originally codified at 42 U.S.C. §1857c-6 (cited in the district court opinion) but later amended and recodified at 42 U.S.C. §7411 (as cited by the court of appeals).

in dispute and that further evidence might have to be taken on that issue.

On January 19, 1977, the district court issued a Memorandum and Order granting the government's motion for summary judgment as to liability and concluding that Unit 5 is a "new source." On June 18, 1978, without hearing any evidence as to the propriety or nature of the injunctive remedy, the district court granted final judgment to the government and permanently enjoined the City from operating Unit 5 in violation of the NSPS sulfur dioxide limitation.

A timely appeal was taken to the Court of Appeals for the Sixth Circuit. On March 26, 1981, the court issued and filed its decision and opinion affirming the district court. On April 29, 1981, the court denied the City's petition for rehearing.

B. Factual background

The City of Painesville owns and operates a municipal electric utility which includes its own power generating facility. Prior to the construction of Unit 5, power was generated by four older coal-fired boilers with supporting equipment.

In 1966 the City recognized that it would need additional, modern power generating capacity. Thereafter, the City purchased a turbogenerator, hired design engineers, prepared detailed plans and specifications, passed ordinances to increase electric rates and finance construction, and even signed a letter of intent to purchase the boiler. However, because of disagreements which developed between the City and its original consultant, the actual execution of a contract for construction of the boiler did not occur until July 28, 1972.

On-site construction for the plant expansion was commenced on January 22, 1973. Boiler erection was begun about July, 1973, and essentially completed in April, 1975. The Unit 5 boiler was started in December, 1975, and is presently the only boiler in normal operation at the Painesville light plant.

Nearly a year after learning that construction of Unit 5 was in progress, the EPA sent a letter on September 18, 1975, to the City asking for more information on Unit 5, stating that it was "concerned" about the applicability of the NSPS to Unit 5. At this point, the boiler was completed and the unit nearly ready for start-up.

In accordance with this request, further information was submitted to the EPA. Finally, on November 24, 1975, the EPA issued a Notice of Violation stating that, if started up, Unit 5 would violate the NSPS for sulfur dioxide. The parties were unable to reach agreement subsequent to the issuance of the Notice of Violation and, at the EPA's request, the government filed its complaint in this case.

C. Background on the development of pertinent air pollution regulations

Section 111(b) of the Clean Air Act sets forth a strict timetable by which the EPA was to develop and publish emissions standards for certain categories of stationary sources of air pollutants. Applicability of these standards was to be limited to those sources which fell under the definition of "new source"; that is, those which commenced construction or modification after the date upon which the EPA published regulations pertaining to those sources. For each of the listed source categories a standard of performance had to be developed which

> ". . . reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Clean Air Act, §111(a)(1).

As the EPA was soon to find out, a determination of the "best system" of emission reduction included more than simply a technical evaluation and an economic impact analysis; rather, it included an investigation of the adverse environmental impact of the selected system, and the Clean Air Act required publication of the results of this analysis along with the standard. *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 385 (D.C. Cir. 1973).

The EPA published proposed standards for fossil fuel fired steam generators (boilers) on August 17, 1971. 36 Fed. Reg. 15704. These proposed standards set forth, *inter alia*, a sulfur dioxide emissions standard of 1.2 lb.[2] After the notice and comment period the EPA published this standard as a final rule (36 Fed. Reg. 24877; December 23, 1971) and subsequently codified it as 40 CFR §60.43(a)(2).

Judicial review of these standards was initiated in the Court of Appeals for the District of Columbia Circuit. *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973). The *Essex* petitioners argued that the EPA acted unlawfully and/or arbitrarily in adopting the particulate, sulfur dioxide and nitrogen oxide standards for coal-fired boilers. While the *Essex* court upheld the particulate and nitrogen oxide standards, it remanded the sulfur dioxide standard to the agency for further development of the record. 486 F.2d at 441. The *Essex* court

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2. Refers to pounds of sulfur dioxide per million British thermal units actual heat input to the boiler.

found that the 1.2 lb. standard was "achievable", using lime slurry scrubbers, but that the EPA had failed sufficiently to evaluate the "counter productive environmental effects" of these scrubbers. 486 F.2d at 440, 441. There was therefore, in the view of the court of appeals, insufficient basis in the record to conclude that scrubbers were the best, adequately demonstrated system for reducing sulfur dioxide emissions.

Pursuant to the *Essex* court's order, the EPA undertook extensive evaluation of the environmental impact of scrubbers. It published the proposed results of this study, along with a solicitation of comments, on September 10, 1975. 40 Fed. Reg. 42045.

This published response by the EPA to the *Essex* remand revealed that the technology (scrubbers) had not been adequately demonstrated *at the time of the proposed standards*, but that the adverse environmental consequences (sludge disposal) had then (in 1975) only recently been solved. However, the EPA concluded there was no basis on which to revise the 1.2 lb. standard in light of the 1975 technology demonstration. After waiting another two years, the EPA published a terse final response to the *Essex* remand without change to the sulfur dioxide standard. 42 Fed. Reg. 61541 (December 5, 1977).

D. The decision of the court of appeals

On June 18, 1978, the district court entered a judgment finding the City's Unit 5 boiler subject to New Source Performance Standards and further ordering "that the defendant, its officers and employees be permanently enjoined and restrained from emitting sulfur dioxide into the atmosphere from the Gainesville Municipal Light Plant, Unit No. 5, in excess of [the NSPS limit]. The district court thereupon stayed the injunction pending appeal.

Even though the record demonstrates,[3] and the government agreed,[4] that there was insufficient evidence before the court to fashion an equitable remedy, the district court issued the permanent injunction without a hearing or the taking of additional evidence relating to the injunctive remedy.

The City has argued that the failure of the district court to hold an evidentiary hearing to determine the presence of the traditional factual predicates essential to the issuance of equitable remedies, and thus to assess the propriety and the nature of an injunctive mandate, violated principles well established by decisions of this Court, including *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975) and *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

While the court of appeals recognized the general applicability of the principles set forth in *Hecht Co.*, it cited this Court's opinion in *TVA v. Hill*, 437 U.S. 153 (1978), as supporting the proposition that, when there is a clear congressional mandate, the district court is "*required* to order injunctive relief upon its finding of liability," (emphasis added) and that "[a] hearing to determine the presence of irreparable injury and inadequacy of legal remedy [is] therefore unnecessary." App. A, p. A17.

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3. Little or no evidence was before the district court relating to many of the factors regarding the equitability and/or the nature of an injunctive mandate, which factors are discussed *infra*. Indeed, the court of appeals noted that there was not even a finding as to the cost of compliance with the district court's mandate. App. A, p. A10 (fn. 7).

4. In a memorandum addressed to the district court, the government acknowledged that the taking of further evidence was needed on the issue of remedy, advising the district court that "[s]hould this Court decide that Unit No. 5 is a 'new source' it will then be faced with the question of the appropriate relief. The United States believes that that question is best left for later, since it appears that there is some disagreement between the parties as to facts relative to that issue and evidence may have to be taken by the Court."

The City also argued in the court of appeals that Unit 5 is not a "new source" within the meaning of the NSPS for sulfur dioxide and thus is not properly subject to the sulfur dioxide standard prescribed therein. The basis for this assertion is that the date of publication of a proposed NSPS for sulfur dioxide (August 17, 1971) was not the proper date for determining which sources are subject to such standard because:

(a) a necessary prerequisite to proposal of such a standard is a determination by the EPA that the standard-defining technology has been "adequately demonstrated";

(b) the *Essex* court held (and the EPA's response to the remand confirmed) that, in failing to address the adverse environmental consequences of such technology, the EPA had not adequately demonstrated the requisite technology (scrubbers), at least as of the time of the 1971 publication; and

(c) if the date of publication becomes the effective date of the standard, under these circumstances the result would be to require a newly constructed source to install unproven technology, which is both unreasonable and beyond the intent of Congress.

The court of appeals rejected this argument, holding it irrelevant whether or not the *Essex* remand invalidated the sulfur dioxide standard. Instead, the court held that the mere publication of a proposed standard, even a defective standard, "determines what sources are new; a source whose construction commenced after such publication is subject to [the standard] *whatever* [*it*] *might be or become*." App. A, p. A7 (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT

In upholding the district court's issuance of an injunction without a hearing, the court of appeals held that the district court was required to order injunctive relief upon its finding of liability, and that a hearing to determine whether, on the facts of this case, such injunctive relief could be justified under traditional equitable principles was unnecessary. Such a holding is in direct conflict with this Court's decision in *Hecht Co. v. Bowles,* 321 U.S. 321 (1944), which the Court recently reaffirmed in *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49 (1975).

This case and *Hecht Co.* rest on parallel facts and similar statutory provisions. In both instances enforcement proceedings were brought on behalf of federal agencies to enjoin violations of (or to mandate compliance with) federal statutes and regulations. In both cases, there was a judicial finding of liability. In *Hecht Co.,* the statute provided that, upon a finding of a violation or impending violation, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 321 U.S. at 322. In the instant case the statute provided that "[t]he Administrator may commence a civil action for appropriate relief, *including* a permanent or temporary injunction" for a violation of Section 111. Clean Air Act, Section 113(b), 42 U.S.C. §1857c-8(b) [later amended and recodified at 42 U.S.C. §7413(b)] (emphasis added).

In *Hecht Co.,* the district court held an evidentiary hearing from which it concluded, *inter alia,* that an in-

junction "would not be in the public interest." *Brown v. Hecht Co.*, 49 F. Supp. 528, 532 (D.D.C. 1943). Accordingly, after such a balancing of the equities, the court held that injunctive relief was not warranted under the circumstances and on that basis refused to issue an injunction. The court of appeals reversed, holding that the statute required the issuance of an injunction (or other order) as a matter of course once violations were found. *Brown v. Hecht Co.*, 137 F.2d 689 (D.C. Cir. 1943). This Court reversed the court of appeals' decision. In so doing, the Court emphasized the principles that should guide the federal courts in the exercise of their equity jurisdiction:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." 321 U.S. at 329-330.

The Court brushed aside the government's assertion that the statute at issue implicitly overrode such equitable considerations by noting that "if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." 321 U.S. at 330. Accordingly, the Court held that the remedial provisions of the statute must be read "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Ibid.*

The court of appeals in this case acknowledged the general applicability of the *Hecht Co.* rule. However, the court read this Court's opinion in *TVA v. Hill*, 437 U.S. 153 (1978), as dispensing with the traditional equitable fact-finding and balancing requirements when there is a "clear congressional mandate." App. A, p. A17. As a threshold matter, it should be noted that the remedial statute at issue in this case does not, any more than that considered by the Court in *Hecht Co.*, evidence any congressional desire "to make such an abrupt departure from traditional equity practice as is suggested." Indeed, the language of the statute, which authorizes "a civil action for *appropriate* relief, including a permanent or temporary injunction" (emphasis added) reinforces, in the words of this Court's opinion in *Hecht Co.*, "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case" and thereby to be "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Simply put, the statutory language at issue affords no support to any suggestion that Congress intended to supplant the traditional equitable principles prescribed in the decision of this Court.

Moreover, upon a careful reading of this Court's opinion in *Hill*, as well as that of the court of appeals to which this Court referred approvingly, it is clear that a departure from such traditional equity practice was not sanctioned in that case. In *Hill*, a fact-finding hearing *was* held by the district court, which thereafter declined to issue an injunction. 419 F. Supp. 753 (E.D. Tenn. 1976). A thorough review of the equities appearing from the record was conducted by the court of appeals, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), which reversed the district court's denial of injunctive relief, and by this Court, which affirmed the

court of appeals. Neither the court of appeals nor this Court, however, held that an injunction must automatically issue in all cases upon a finding of liability. Rather, the court of appeals concluded from its extensive review of the record made before the district court that, in the absence of injunctive relief, "the national policy objectives of a statute [would be] frustrated," and, in that light, it held that "[t]he district court abused its discretion when it refused to enjoin" the completion of the Tellico Dam. 549 F.2d at 1074-75. Likewise, this Court determined that, in denying the injunction in that case, the district court had abused its discretion by substituting its opinion as to the "wisdom or unwisdom" of the statute for that of Congress. In so doing, however, the Court did not hold that the federal court lacked discretion in all cases in fashioning remedies for violations of federal statutory requirements. Indeed, it expressly reaffirmed the *Hecht Co.* rule that a federal judge "is not mechanically obligated to grant an injunction for every violation of law." 437 U.S. at 193. In this light, the petitioner respectfully submits that the court of appeals in this case misread *Hill* when it concluded that that decision had completely obviated the necessity for a federal district court, sitting as a court of equity, to conduct a hearing for the purposes of assessing the efficacy of alternative remedies and determining the presence or absence of the traditional prerequisites to extraordinary equitable relief.

The petitioner has no quarrel with the court of appeals' statement that the "[district court's] reliance upon the traditional 'practices of equity must be 'conditioned by the necessities of the public interest which Congress has sought to protect.'" App. A, p. A16. However, in this case there was neither an examination into, much less reliance upon, the traditional practices of equity to be so conditioned nor

a comparative analysis of the various alternative remedies available and, perhaps most importantly, the relative effect of each upon the necessities of the public interest.

Neither *Hecht Co.* nor *Hill* can properly be read, as the court of appeals apparently did in this case, either to foreclose altogether, or to relieve the district court of the duty to conduct, such an inquiry prior to issuing extraordinary equitable relief. In *Hill,* the federal courts determined, upon review of the record developed from a hearing in the district court, that in the absence of injunctive relief the public policy would be frustrated and that, on that account, the relevant equitable considerations balanced in favor of extraordinary injunctive relief. No such conclusion, however, can be gleaned from the meager record in this case and, the petitioner submits, if a hearing had been conducted in the district court, the record would point to the opposite conclusion. Unfortunately, neither the court of appeals nor this Court can now apply in this case the doctrine of *Hill* and *Hecht Co.* on the balancing of equities, because no hearing was held on the issue of injunctive remedy and there is thus no record to examine. The petitioner submits, however, that a number of factors, unexamined by the district court, weigh heavily in a determination as to whether an injunction should issue and, if so, what the specific terms of such injunction should be. The following is but a partial listing of some of the issues that the petitioner believes should have been fully considered by the district court prior to the issuance of an injunction:

1. The manner in which compliance with the New Source Performance Standard could be achieved, and the time required for such compliance.

2. The cost of compliance and the problems associated with the financing of a compliance program, especially in

light of the legal constraints placed upon a municipality in funding the cost of compliance, by the issuance of bonds or otherwise.

3. The effect of possible adverse environmental consequences of the district court's injunction. As discussed at page 22, *infra*, the injunction, as presently framed, will likely increase, rather than decrease, pollutant emissions, thus defeating "the necessities of the public interest which Congress has sought to protect" in the Clean Air Act. Certainly this overriding public concern should be considered by the district court in fashioning an appropriate judicial remedy.

4. Whether the conduct of the EPA during the construction of Unit 5 or in its response to the *Essex* remand constitutes laches or an estoppel to the granting of equitable relief or should mitigate the nature of such relief.

5. The adverse consequences of the district court's injunction upon City residents, taxpayers, bondholders, and utility customers.

In short, neither the Congress—as evidenced by the language, previously noted, of Section 113(b) of the Clean Air Act—nor this Court—as evidenced by the language of its opinions in *Hecht Co.* and *Hill*—has shackled the courts to predetermined mandates in administering equitable justice under the Clean Air Act. The blind and mechanical issuance of a prohibitory injunction under the Clean Air Act, as in any case, disserves not only the affected parties and the public, but justice as well. For this reason, the petitioner submits that the Court should grant the writ of certiorari in this case to correct the deviation by the court of appeals and the district court from the elemental principles of equity jurisprudence clearly delineated in previous decisions of this Court.

II. THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

A. The decision below misconstrues an important statutory element of the Clean Air Act and establishes erroneous precedent that transcends this case and factually similar cases

Section 111 of the Clean Air Act imposes environmental constraints upon many of the newly constructed major emissions sources throughout the United States. New standards are continually being imposed, and the question as to whether the standard applies to a particular source arises in each instance.

The purpose of Section 111 of the Clean Air Act is to require newly constructed emissions sources to adhere to rigid environmental standards which can be achieved by the installation of "state-of-the-art" pollution control equipment at the time of construction. To accomplish this goal, Congress set out a specific procedure by which emissions standards for new sources would be determined and implemented.

First, the EPA had to determine and define the best system for reducing sulfur dioxide emissions. In this case, the selected system was the lime slurry scrubber. Second, the EPA had to demonstrate that the system was cost effective and without adverse environmental consequences. Third, the EPA had to determine the emissions level which can be achieved by implementation of the selected system; that is, the performance standard. Only then is the resulting performance standard proposed and published in the Federal Register. In short, it is the demonstrated technology that determines the emissions standard.

The EPA's economic and environmental demonstration is most crucial to the prospective new source owner because it determines whether the inclusion of the selected emissions control system in the design of the source is economically and environmentally justified. It was the EPA's environmental demonstration which was found to be lacking by the Court of Appeals for the District of Columbia Circuit in *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427 (1973). The court upheld the EPA's determination that scrubbers were the best emissions reduction system, that the system was economically acceptable, and that the 1.2 lb emissions standard could be achieved by the use of scrubbers. However, the court held that the EPA had not demonstrated the use of scrubbers to be environmentally sound, in light of serious waste disposal problems associated with the spent lime slurry. As the EPA's later response to the *Essex* court's remand proved, the court's concern was well founded. While the EPA asserted that the disposal problem had subsequently been solved, it had not been solved at the time the proposed standard was published or, for that matter, at the time of either the *Essex* court's decision or the City's contract to construct Unit 5, and there was, of course, no assurance at that time that it would ever be solved.

In finding the effective date of the sulfur dioxide standard to be August 17, 1971, the court of appeals in this case stated that the publication of an emission standard constitutes the effective date for determining compliance with such standard, "whatever [such standard] might be or become." App. A, p. A7. The court further held that even if the sulfur dioxide standard was invalidated in the *Essex* case, the 1971 date would remain the effective date for determining the applicability of any subsequently established sulfur dioxide NSPS. The petitioner submits that the *Essex* court's determination with respect

to the technology underlying the sulfur dioxide standard mandates a contrary result if the evident policy of the Clean Air Act, to give new source owners reasonable notice of what is required of them, is to be honored. In essence, since the *Essex* decision determined that the technology (lime slurry scrubbers) underlying the published emissions standard had not been adequately demonstrated, the court of appeals' decision in this case undermines a major policy underlying the Act by requiring a prospective new source owner either to install then-unproven technology, to halt construction altogether until and unless the technology is subsequently developed and proved to satisfy the published standard, or to take the economically perilous course of proceeding with construction subject to an open-ended obligation to retrofit the new source at some uncertain point in the future with subsequently demonstrated technology. It seems clear that, in requiring a proposed NSPS to be accompanied by a statement of the demonstrated technology that could be employed to satisfy it, Congress intended to prevent just this sort of economic stalemate. Moreover, if the court of appeals in this case is correct in holding that the sulfur dioxide NSPS was retroactive to the date of publication of the proposed standard, the prospective new source owner would in effect be called upon to install technology that had not been demonstrated to be environmentally sound, a result that seems irreconcilable with the basic purpose of the Clean Air Act.

The *Essex* petitioners challenged the sulfur dioxide standard on two grounds; (1) that the emission standard was not achievable by use of the demonstrated technology and (2) that the identified control technology had not been adequately demonstrated (taking into consideration cost and adverse environmental impact). Had the *Essex*

court upheld the EPA's determination that the control technology had been adequately demonstrated, a concurrent finding that the emission standard was erroneous (that is, not achievable by the demonstrated technology) would not necessarily have invalidated the publication date for the proposed standard as a determinant for identifying new sources. In such a case the emission standard, whatever it eventually "might be or become," would still represent that standard which is achievable using the demonstrated technology. There would be no significant danger of the retroactive application of a subsequently defined (or redefined) standard, since the source owner would still be required to install the identified control technology, which itself serves to define the standard that must be satisfied.

However, the *Essex* court found the emission standard achievable by use of the identified control technology (scrubbers), but found the control technology not to have been adequately demonstrated. The effect of that holding must be to void the proposed rule publication date as determining whether a source built thereafter is subject to the emission standard. A contrary conclusion would create a significant potential for arbitrary and economically wasteful results wholly unintended under the Act.

It is clear from Section 111 of the Act that a source owner cannot be required to install pollution control technology until it has been adequately demonstrated. It is likewise clear that Section 111 contemplates the installation of such controls at the time of the initial design and construction of the source. It logically follows, therefore, that if the control technology is not feasible (that is, has not been adequately demonstrated) at the time of construction, its inclusion should not be mandated in the design of the source.

Although the regulatory procedure prescribed under the Act implicitly sanctions some degree of retroactivity for the standards as ultimately promulgated, the impact of such retroactivity is tempered by the fact that prospective new source owners will be put on notice by the proposed standard as to the technology that they are expected to incorporate. In this fashion, the purposes of the Act will be served without engendering either economic chaos or economic stalemate during the period between the publication of proposed regulations and their ultimate promulgation. The decision of the court of appeals, however, would open the door to the sort of uncertainty that Congress tried to avoid regarding what is expected of a prospective new source owner. For while the new source owner would be on notice as to the standard, he would not be apprised of what feasible technology, if any, he could employ to satisfy the standard. He would thus be faced with the Hobson's choice of suspending all construction until and unless the uncertainty clears, taking the economic risk of installing undemonstrated technology, unilaterally undertaking at his own expense to discover feasible technology that will satisfy the published standard, or proceeding with construction but with the knowledge that he may subsequently be required to incur a retrofit expense of unpredictable dimension. It is precisely because the court of appeals' retroactive application of the standard creates such an economic dilemma that the petitioner believes it cannot be reconciled with the evident intent of Congress under the Act to furnish reasonable notice to prospective new source owners of the technology they should plan to incorporate into their facilities.

In the same vein, the degree of retroactivity sanctioned by the court of appeals creates an unacceptable potential for administrative abuse. Carried to extremes, such interpretation means that the EPA could propose any arbitrary

new source standard, without any demonstrated technical basis for such a standard, so as to "catch" as many sources as possible. As previously discussed, these sources would as a consequence be faced with the unenviable choice of designing to meet an irrational and infeasible standard, not building at all, or subsequently retrofitting to meet a standard which may not become finalized for many years hence. The purpose of Section 111 was not intended to promote irrational standards, to halt the construction of new sources, or to require retrofit; on the contrary, the statute can only be justified on the basis that the time to undertake the installation of the latest and best control technology is before construction of the source has been commenced.

B. The immediate consequences of the decision below will adversely affect many persons directly and indirectly involved

The adverse consequences which would result from the issuance of the district court's injunction are both real and substantial. If the court of appeals' judgment is let stand, and its mandate is issued to the district court, the injunction will become immediately effective, and the City will be enjoined from operating Unit 5 in excess of the NSPS sulfur dioxide limit. The City would be forced to shut down Unit 5, since this boiler cannot be operated in compliance with the NSPS sulfur dioxide emissions limitation prior to the installation of additional pollution control equipment.[5]

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5. As the EPA concedes, compliance with the NSPS sulfur dioxide emissions limitation would require either the installation of a scrubber or the combustion of low sulfur coal, if such coal is in fact available. However, low sulfur coal cannot be burned in this boiler without major modifications to the particulate emissions control equipment. In either case, it would take considerable time to achieve compliance.

Because the City's other coal-fired boilers cannot presently be used to meet demand, the practical effect of the injunction would be to completely shut down the light plant and force the City to purchase power from other sources in order to meet customer demand. Moreover, such purchased power would very likely be supplied in large part from coal-fired boilers which may well emit more sulfur dioxide (per kilowatt-hour of electricity produced) than would Unit 5 but would escape classification as new sources within the reach of NSPS.[6] The judgment could thus lead to the anomalous result that the geographic region served by Unit 5 would experience more, rather than less, air pollution. Indeed, should operation of Unit 5 in compliance with the sulfur dioxide NSPS prove economically infeasible, this increase in sulfur dioxide emissions could become permanent. Thus, although the intent of Section 111 is to promote the implementation of the best emissions control technology for new sources, the primary purpose of the Clean Air Act, to reduce air pollution, would be frustrated in this case.

Such adverse consequences would befall not only the City's residents, taxpayers, bondholders and utility customers but others as well. Shortly after the issuance of the opinion below, the District Court for the Southern District of Ohio, relying upon this case as controlling law, determined that a boiler constructed by the City of Hamilton, Ohio, municipal electric plant is subject to the sulfur dioxide NSPS. *City of Hamilton v. Gardebring*, Civil No. 1-79-552 (Decision of May 26, 1981; App. I).

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6. Purchasing power from other sources would increase demand upon such sources, which demand would be met, at least in part, by pressing into service less fuel-efficient boilers. Unit 5 is more efficient than the City's older boilers and presumably more efficient than the boilers supplying replacement power. The replacement boilers would use more coal to supply an equivalent amount of electricity and would produce more sulfur dioxide emissions (burning the same coal) than would Unit 5 during the time it would take to bring Unit 5 into compliance.

C. The decision below, if let stand, will result in the unequal application of the Clean Air Act in different jurisdictions

In 1976 the government, at the EPA's request, brought an enforcement action in the District Court for the Southern District of Indiana against the Public Service Company of Indiana ("PSI"), alleging that two of PSI's boilers were subject to NSPS for sulfur dioxide and seeking the same relief as it sought in this case. *United States v. Public Service of Indiana,* 12 ERC 1495 (1977) (App. H). Attorneys for the government and the EPA in that case also participated in the instant case.

The facts in *Public Service Co.* and this case are indistinguishable. Both the City and PSI had begun the planning for new generating units well before 1971, having, *inter alia,* purchased turbogenerators before 1971. However, neither the City nor PSI executed formal contracts for the boilers until after 1971. In its post-trial brief, the government cited the 1977 decision by the district court in this case as authority for its position in *Public Service Co.*

The district court in *Public Service Co.* held, however, that PSI was not subject to NSPS for sulfur dioxide because (1) PSI had commenced construction of the "source", which the court defined as the entire power generating unit, prior to the date of publication of the proposed standards (August 17, 1971), and (2) in any case, the *Essex* remand had invalidated the publication date as the effective date for determining applicability of the sulfur dioxide NSPS.

The government did not pursue an appeal of the district court's decision in *Public Service Co.* While the petioner cannot speculate as to the government's reasons not to pursue such an appeal, it should be noted that the

Public Service Co. decision was never reviewed by the Court of Appeals for the Seventh Circuit by choice of the government.

The *Public Service Co.* case, of course, does not represent the conflict between circuits contemplated by Rule 17(a) of this Court. The petitioner urges the Court, however, to give consideration to the conflicting *Public Service Co.* decision in its determination of the importance of the questions presented, in light of the inconsistent application of the Clean Air Act that will result between the citizens and utility customers in Ohio and Indiana, and in light of the different burden carried by each in fulfilling the objectives of the Act. In this regard, the petitioner would call the court's attention to the fact that it has previously recognized the relevance of conflicting district court decisions in determining the importance of the questions presented for review, especially when the conflict leads to a disparate application of federal law between jurisdictions. *United States v. Constantine,* 296 U.S. 287 (1935).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 1981

APPENDIX A

Decision and Opinion of the Court of Appeals

(Filed March 26, 1981)

No. 78-3551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CITY OF PAINESVILLE,OHIO,
Defendant-Appellant.

ON APPEAL from the United States District Court for The Northern District of Ohio.

Before: KEITH and BROWN, *Circuit Judges;* WISEMAN, *District Judge**.

WISEMAN, *District Judge.* The first of two questions before the Court is whether the district court erred in holding that a boiler operated by the Painesville Municipal Electric Utility is a "new source" under section 111(a)(2) of the Clean Air Act [the Act], 42 U.S.C. § 7411(a)(2)

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*Honorable Thomas A. Wiseman, Jr., District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

(Supp. III 1979).[1] The second issue is whether the district court was required to hold an evidentiary hearing before permanently enjoining the City of Painesville from emitting sulfur dioxide from its boiler in excess of the Environmental Protection Agency's [EPA's] "new source" standards for sulfur dioxide [SO_2]. The Court answers both questions negatively, and accordingly the actions of the district court are affirmed.

Section 111 and the New Source Performance Standards

In *ASARCO, Inc. v. EPA*, 578 F.2d 319, 321-22 (D.C. Cir. 1978), Judge Skelly Wright provided a succinct overview of the 1970 amendments to the Clean Air Act, and it serves equally well as an introduction to the instant case. According to Judge Wright (now Chief Judge of the D.C. Circuit), the 1970 amendments to the Clean Air Act were passed in recognition of the failure of state governments to cooperate with the federal government in effectuating the Act's commitment "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Clean Air Act § 101(b)(1), 42 U.S.C. § 7401(b)(1). *See generally* W. Rodgers, Environmental Law § 3.1 (1977). The 1970 changes were designed to increase the federal government's role in the battle against air pollution. *See Train v. Natural Resources Defense Council, Inc.*, 421 U.S.

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1. The Clean Air Act was first enacted in 1955 and there have been frequent amendments, most notably in 1970 and 1977. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. At the time this litigation began, the Act was codified at 42 U.S.C. § 1857, *et seq.* The 1977 amendments rearranged many provisions of the Act and recodified it at 42 U.S.C. § 7401, *et seq.* 42 U.S.C. § 7411(a)(2) was formerly codified at 42 U.S.C. § 1857c-6(a)(2) (1976).

60, 64 (1975). The amendments require the states to develop pollution control programs (State Implementation Plans) that will keep levels of certain air pollutants below the National Ambient Air Quality Standards set by EPA. Clean Air Act §§ 109, 110, 42 U.S.C. §§ 7409, 7410.

The 1970 amendments also added section 111, which is at issue on this appeal. Section 111 directs EPA to set specific, rigorous limits on the amounts of pollutants that may be emitted from "new sources" of air pollution. The New Source Performance Standards established under this section are designed to force new sources of targeted air pollutants to employ the best demonstrated systems of emission reduction. 42 U.S.C. § 7411(a)(1). Because these New Source Performance Standards are likely to be stricter than emission standards under State Implementation Plans, plant operators have an incentive to avoid application of the new source standards. Such a situation is presented by the instant case; EPA's new source standard for coal-fired steam generators allows 1.2 lbs. SO_2/mBtu, while the Ohio plan would impose a limit of 2.1 lbs./mBtu on Painesville's boiler.

The Facts

The government, at the request of EPA, filed a complaint in the Northern District of Ohio against the City of Painesville on April 4, 1976. The complaint alleged that the coal-fired boiler in Unit No. 5 of the electrical generating plant operated by the Painesville Municipal Electric Utility [Boiler No. 5] was emitting sulfur dioxide in excess of the permissible standards established by EPA pursuant to section 111(b) of the Act. EPA's SO_2 standard for new sources, which is published at 40 C.F.R. § 60.43 (1980), allows 1.2 lbs. SO_2/m Btu derived from solid fossil fuel. The complaint alleged that Boiler No. 5 emits 4.8 lbs. SO_2/mBtu heat input, thereby constituting a vio-

lation of section 111(e) of the Act,[2] which makes it unlawful to violate the standards of performance established by EPA.

The City has never denied that Boiler 5 exceeds the SO_2 new source standard, but it has consistently maintained that Boiler No. 5 is not a new source at all. Ultimately, the issue of whether Boiler No. 5 is a new source was the sole issue presented to the district court on cross-motions for summary judgment, and the district court's holding that Boiler No. 5 is a new source under section 111(a)(2) established the City's liability for violating the Act. *See United States v. City of Painesville*, 431 F. Supp. 496, 501 (N.D. Ohio 1977).

In his January 19, 1977, Memorandum awarding summary judgment to the government, District Judge Manos ordered the parties to prepare plans for the operation of Boiler No. 5 so that it would comply with the 1.2 lbs./mBtu standard. The parties entered "lengthy and thorough discussions"[3] under the court's supervision, but they failed to reach agreement on a plan. Consequently, on June 18, 1978, the district court issued an injunction ordering the City to comply with the SO_2 standard, Judge Manos having concluded that further negotiations would be fruitless. There was no hearing on this injunction, but the judge stayed the effect of his order pending this appeal.

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2. Section 111(e) provides as follows:

(e) Prohibited Acts. After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

42 U.S.C. § 7411(e).

3. *United States v. City of Painesville*, No. C76324 (Order of June 18, 1978).

Discussion

On this appeal, the City challenges both the district court's finding of liability in its award of summary judgment and its issuance of an injunction without a prior evidentiary hearing. The City raises three arguments in opposition to the finding of its liability. First, the City maintains that the D.C. Circuit's remand in *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 441 (D.C. Cir. 1973), *cert. denied sub nom. Appalachian Power Co. v.* EPA, 416 U.S. 969 (1974), operated to remove the boiler's status as a new source. Second, the City asserts that EPA erroneously applied its own regulations in determining that Boiler No. 5 was a new source or, third, that EPA, in its regulations, misinterpreted the statutory definition of "new source" found at section 111(a)(2). In challenging the district court's granting of injunctive relief, the City maintains that equitable principles required the court to hold an evidentiary hearing before issuing the permanent injunction. These arguments will be discussed in order.

A. The District Court's Summary Judgment

1. The Effect of Essex Chemical Corp. v. Ruckelshaus

In *Essex Chemical Corp. v. Ruckelshaus, supra*, the D.C. Circuit reviewed EPA's sulfur dioxide, particulate matter, and nitrogen oxide standards for coal-fired steam generators. The court approved the particulate matter and nitrogen oxide standards, but it remanded the record for further consideration by EPA of the adverse environmental effects that might result from requiring a 1.2 lbs./mBtu standard for coal-fired steam generator plants that must use a "lime slurry scrubbing system" in order to achieve the SO_2 standard. Such systems produce a great deal of solid waste in the form of sludge, and the circuit

court concluded that EPA had not given adequate consideration to the environmental problems posed by this form of solid waste.[4] *Essex* was decided on September 10, 1973, approximately two years after the proposed 1.2 lbs./mBtu standard had been published on August 17, 1971. 36 Fed. Reg. 15,704 (1971).

The City argues that the *Essex* remand retroactively voided the proposed SO_2 standard published on August 17, 1971, so that there was no new source standard for SO_2 in effect when the City entered its contract to purchase Boiler No. 5 on July 25, 1972.[5] This proposition is taken one step further, however, by the City's argument that the remand of the SO_2 standard lifted Boiler No. 5 out of the class of new sources altogether, with the result that the new source standard for SO_2 ultimately adopted by the EPA after the *Essex* remand (1.2 lbs. SO_2/mBtu, the same standard) was inapplicable to Boiler No. 5.[6] In other words, the City maintains that if the D.C. Circuit remands a record for a new source standard so that the EPA can reconsider the substantive standard, that action effectively obliterates not only the standard, but the class of new sources to which the standard was applicable. Moreover, the former new sources are forever relieved of complying

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4. A lime slurry scrubbing system was the anticipated "best system" for achieving the SO_2 standard of performance. *See* 486 F.2d at 440.

5. Under the EPA's regulations as applied to the instant case, the date of the purchase contract for the boiler was the date upon which construction "commenced" under section 111(a)(2) of the Act, which defines new sources. 40 C.F.R. § 60.2 (1980). The statute provides that if the construction of a new source is commenced before the publication of proposed regulations prescribing a standard of performance for the particular source, that source will not be included in the class of new sources.

6. On September 10, 1975, EPA published its initial response to the *Essex* remand, concluding that no change in the SO_2 standard was warranted. 40 Fed. Reg. 42,045 (1975). EPA stood by this conclusion in its final response to *Essex* on November 23, 1977. 42 Fed. Reg. 61,541 (1977).

with any future new source standards. Another class of new sources would come into existence only when EPA publishes a response to the remand, and that class becomes fixed only when the D.C. Circuit approves the reconsidered standard.

The City's argument is completely at odds with the plain meaning of the statute. Section 111(a)(2) provides as follows:

> The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

42 U.S.C. § 7411(a)(2).

The statute unambiguously establishes the benchmark for determining which sources of a particular pollutant are new sources. "[T]he publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance . . . which will be applicable to such source" determines what sources are new; a source whose construction commenced after such publication is subject to the new source standards, whatever they might be or become. The City argues, in effect, that new sources of SO_2 remain unknown until the D.C. Circuit approves an "ultimate" SO_2 standard. This argument must fail, however, because Congress provided that even the publication of *proposed* regulations establishes the cut-off date for identifying new sources of a particular pollutant. A proposed regulation is, of course, subject to both administrative and judicial review and, consequently, modification. By identifying new sources with reference to the publication date of a proposed standard, Congress eschewed the City's position that new sources of SO_2 remain unknown

until the substantive standard becomes unreviewable. The City's argument confuses the criteria for identifying new sources with the validity of substantive new source standards.

If the *Essex* remand invalidated the 1.2 lbs./mBtu standard (an extensively disputed but ultimately irrelevant point), the City could not have violated the SO_2 new source standard until EPA responded to the remand on September 10, 1975. *See* 40 Fed. Reg. 42,045 (1975). But given the plain meaning of the statute, the *Essex* remand had no effect on Boiler No. 5's status as a new source within the meaning of section 111(a)(2). That status was conferred on August 17, 1971, the day EPA published proposed SO_2 standards for coal-fired boilers. *See* 36 Fed. Reg. 15,704 (1971). Once Boiler No. 5 became a new source, it remained a new source regardless of what happened to the 1.2 lbs./mBtu standard. The Court therefore rejects the City's argument that the *Essex* remand somehow nullified Boiler No. 5's obligation to comply with the 1.2 lbs./mBtu new source performance standard for SO_2 that was in effect when the government brought this action in April 1976.

2. EPA's Interpretation of Its Own Regulations

In pursuing its legislative mandate under section 111 (b) of the Act to create performance standards for new sources of air pollution, EPA adopted regulations to construe the statutory definition of "new source" set forth in section 111(a)(2) of the Act:

> (2) The term "new source" means any stationary source, the *construction* or modification of which is *commenced* after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source (emphasis added).

EPA adopted this definition of "construction": "Construction" means "fabrication, erection, or installation of an *affected facility.*" 40 C.F.R. § 60.2 (1980) (emphasis added). With reference to a stationary source, an "affected facility" is "any apparatus to which a standard [of performance] is applicable." 40 C.F.R. § 60.2 (1980). In regard to the City's electrical generating plant, EPA concluded that the boiler "apparatus" was the "affected facility," and thus the commencement date of its construction determined whether the City would have to comply with the new source standards.

EPA interpreted the statute's use of the word "commenced" in this fashion:

> (i) "Commenced" means, with respect to the definition of "new source" in section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

40 C.F.R. § 60.2 (1980).

The City did not contract for the purchase of Boiler No. 5 until July 28, 1972, almost a full year after the cut-off date for new sources of SO_2 (August 17, 1971). Consequently, EPA concluded that because the construction of Boiler No. 5, the "affected facility," commenced after August 17, 1971, it was a new source.

The City argues that EPA misinterpreted its own regulations in concluding that the boiler is a new source. An agency's interpretation of its own regulations is controlling unless plainly erroneous. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 17 (1965); *Compton v. Tennessee Dept. of Public*

Welfare, 532 F.2d 561, 565 (6th Cir. 1976). Having reviewed EPA's regulations set forth above and the agency's application of them to the instant case, the Court cannot find that EPA's interpretation is plainly erroneous.

3. EPA's Interpretation of Section 111(a)(2) of the Clean Air Act

Apart from its argument that EPA misapplied its own regulations, the City also argues that EPA's regulations misinterpret the statutory definition of "new source" found in section 111(a)(2). Section 10(e) of the Administrative Procedure Act defines the scope of judicial review of EPA's regulations interpreting the Clean Air Act. A reviewing court is required to determine whether the agency's action was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(C) (1976). *See ASARCO, Inc. v. EPA*, 578 F.2d 319, 325 (D.C. Cir. 1978). EPA's interpretation of the Clean Air Act is to be given considerable deference, however. *Id.*

The City's argument is essentially economic; the City maintains that because it will be very expensive to comply with the SO_2 new source standards,[7] Congress could not have meant to inflict such expense on an operator in the City's position. The City emphasizes that it began planning for the construction of a new Unit No. 5 (consisting of the boiler, a turbogenerator set, and auxiliary equipment) in 1966 after determining that it would need additional power generating capacity if it wished to remain in the business of generating electricity. Thereafter, the City purchased a 25,000 kW turbogenerator, hired consulting engineers to begin design work on the plant ex-

7. The record does not show how expensive compliance will be, however.

pansion, and passed ordinances to finance the construction. In April 1970 the City even signed a letter of intent to enter a contract to purchase a certain boiler, but that contract was never executed.

The City maintains that it is "harsh and unreasonable" to require compliance with the SO_2 new source standards, because if it had known in 1966 that its utility would have to bear the expense of complying with such standards, the City might well have decided to close its generating facility instead of initiating the construction program. Moreover, if the SO_2 standards are now applied to Boiler No. 5, the Painesville utility might before, [sic] non-competitive with the adjacent large utility that could supply Painesville's customers. The City acknowledges that it did not contract for its boiler until after the SO_2 standard was published, but it also maintains that this circumstance is relatively insignificant in light of the major efforts that had been undertaken in contemplation of constructing Unit No. 5.

The Court is sympathetic to the City's potential economic burden, but the unambiguous language of section 111(a)(2) easily bears EPA's interpretation of it. The statute plainly provides that new sources are those whose construction is commenced after the publication of the particular standards of performance in question. Given this statutory language, EPA would not have exceeded its authority even if its regulations had defined the commencement of construction as the time of groundbreaking. EPA was more lenient, however, and defined commencement of construction as, in essence, the time when a purchase contract for a polluting apparatus is executed. *See* 40 C.F.R. § 60.2 (1980). The statutory language compels the conclusion that EPA's regulations identifying Boiler No. 5 as a new source of SO_2 do not exceed EPA's congressionally mandated authority.

Because the statute alone unambiguously allows EPA's interpretation, there is no need to consider the legislative history of the 1970 Clean Air Amendments. *See United States v. Sutton*, ... F.2d ....., ... (6th Cir. 1980). The Court will briefly observe, however, that the legislative history weighs heavily against the City's position. The City's basic complaint is that compliance with the SO_2 new source standard will be expensive, and from that premise it attacks EPA's statutory authority to impose such costs on the City, in its particular circumstances. However, the legislative record demonstrates a congressional awareness that compliance with new source standards would be costly. Nonetheless, the choice was made to impose those costs. As stated in the Senate Report, "maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective, and in the long run, the least expensive approach." S. Rep. No. 1196, 91st Cong., 2d Sess. 16 (1970), *reprinted in* Legislative History of the Clean Air Amendments of 1970, at 416 (Comm. Print 1974) [hereinafter cited as Legislative History]. This passage reflects a congressional decision that the short-term costs of "maximum feasible control" are ultimately less expensive than the long-term costs of increasing air pollution. As Senator Cooper stated during the Senate debate on the new source standards, "[t]he concept is that whenever we can afford or require new construction we should expect to pay the cost of using the best available technology to prevent pollution." Referring to the Clean Air Amendments in general, Senator Cooper went on to observe that the 1970 Act "assumes a readiness by industry and the people or [*sic*] the country to pay the costs of pollution control." 116 Cong. Rec. 32918, 32919 (1970), *reprinted in* Legislative History 260, 262. Even more illuminating is an exchange between Senator Muskie and Senator Randolph during

Senate consideration of the Conference Report on December 18, 1970. In response to an inquiry from Senator Randolph, Senator Muskie stated that the new source performance standards "undoubtedly will have an economic impact all across this country." Senator Randolph then stated: "Yes, it will, and it will be costly. And yet the ugly face of pollution must be erased." 116 Cong. Rec. 42392 (1970), *reprinted in* Legislative History 145. A clearer recognition of the economic impact of new source standards could hardly be imagined. *Cf. Cleveland Electric Illuminating Co. v. EPA*, 572 F.2d 1150, 1164 (6th Cir.), *cert. denied sub nom. Timken Co. v. EPA*, 439 U.S. 910 (1978) (upholding EPA's SO_2 control plan for Ohio).[8]

The Court's only reservation about the applicability of new source standard to Boiler No. 5 is based on what appears to have been one of the primary aims of the new source standards. As stated in the House Report:

> The promulgation of Federal emission standards for new sources in the aforementioned categories will preclude efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of extra-hazardous or large-scale emissions therefrom.

H. R. Rep. 91-1146, 91st Cong., 2d Sess. 3, *reprinted in* Legislative History 893; [1970] U.S. Code Cong. & Ad. News 5356, 5358. The new source standards prevent industries from "shopping around" for "pollution havens" that might otherwise exist if the states were allowed any

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8. For all of the reasons discussed in text, the Court disagrees with the decision of the district court in *United States v. Public Service Commission*, 12 Envir. Rep. (BNA) 1495, 1502 (S.D. Ind. 1977). That court concluded that EPA's regulations at 40 C.F.R. § 60.2 defining "stationary source," "affected facility" "construction" and "commenced" are contrary to the Clean Air Act's definition of "new source" in section 111(a)(2).

flexibility in setting standards for new sources. *See* 116 Cong. Rec. 32902 (1970) (remarks of Senator Muskie), *reprinted in* Legislative History 227; Environmental Law Institute, Federal Environmental Law 1104 (1974). Such shopping around is foreclosed by the new source standards, because they set a nationwide "floor" on permissible levels of pollution from new sources. *See* Clean Air Act § 116, 42 U.S.C. § 7416; W. Rodgers, Environmental Law § 3.2, at 217 (1977). Because the new source standards must reflect "the application of the best technological system of . . . emission reduction," 42 U.S.C. § 7411(a)(1), this federal standard will invariably equal or exceed the standard imposed by State Implementation Plans for existing sources adopted pursuant to section 110 of the Act, 42 U.S.C. § 7410.[9] *See ASARCO, Inc. v. EPA, supra,* 578 F.2d at 322. Consequently, there is no incentive for industries to move to relatively pollution-free states whose implementation plans for achieving the National Ambient Air Quality Standards might be more accommodating to new industry.

Painesville's municipal electrical utility is obviously not in a position to "shop around" for another location, and thus the "pollution haven" rationale for the new source standards does not apply. If the sole purpose for section 111 were to prevent states from adopting different new source standards in order to compete with each other for new industry, the Court would be inclined to read a "municipal utility exception" into the statute, because such utilities are simply not in a position to seek "pollution havens." It is apparent, however, that the overriding purpose of section 111 is to prevent significant new pollution

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9. For example, the Ohio plan for existing sources of SO_2 would allow Boiler No. 5 to omit 2.1 lbs. SO_2/mBtu, while the federal new source standard imposes a much stricter limit of 1.2 lbs./mBtu.

problems, without regard to existing ambient air quality conditions. *See* H.R. Rep. 91-1146, *supra*, at 3, 5, *reprinted in* Legislative History 893, 895; [1970] U.S. Code Cong. & Ad. News, *supra*, at 5358, 5360-61; 116 Cong. Rec. 33075 (1970) (remarks of Sen. Randolph), *reprinted in* Legislative History 289. The Senate Report specifically found that electric generating plants must be controlled to the "maximum possible degree," and it directed EPA to establish new source standards for power plants. S. Rep. No. 91-1196, *supra*, at 16; Legislative History 416. No exception was made for municipalities.[10] The Conference Committee agreed that power plants should be subject to new source standard, and the Committee did not suggest any exception for municipalities. *See* 116 Cong. Rec. 42384 (1970), *reprinted in* Legislative History 130. The new source standards were drafted to "insure that major new stationary sources, wherever they are located, are designed and equipped to reduce emissions to minimize feasible levels." New source standards also tend to minimize the competitive advantage of locating new facilities in areas where emission standards might otherwise be less rigorous, but this was not the *primary* purpose of section 111. *See* Hearings on Air Pollution Control Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, Legislative History 1369 (statement of Robert Finch, Secretary of Health, Education, and Welfare). Accordingly, the Court will not infer an exception to the statute that would relieve municipalities from complying with new source standards.

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10. The Senate specifically included municipal incinerators as a stationary source that should be subject to new source standards. This circumstance strongly suggests that the Senate did not intend to create any "municipality exceptions" to the new source standards, even though the "pollution haven" rationale would not apply to municipal incinerators, just as it is inapplicable to municipal electrical generators.

In summary, the Court holds that the EPA regulations defining "affected facility," "commenced," and "construction," 40 C.F.R. § 60.2, as applied to the instant case, do not exceed EPA's statutory authority.

B. The Lack of an Evidentiary Hearing on the Injunction

The City argues that Judge Manos should have held a formal evidentiary hearing before issuing his June 18, 1978, injunction that requires Boiler No. 5's compliance with the SO_2 new source standard. The argument is based on the premise that "the appropriate principles of inadequate remedy at law and irreparable harm must be established" before a court orders injunctive relief. The City argues from this premise that the district court violated these traditional equitable principles by not holding a hearing to establish inadequacy of a legal remedy and irreparable harm, and the City asks this Court to remand for such a hearing.

Section 113(b) of the Act, 42 U.S.C. § 7413(b), empowers district courts to provide injunctive relief for violations of section 111(e), which prohibits violation of EPA new source standards. In *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944), the Supreme Court emphasized that when a court is called upon to enforce a federal statutory injunction, its reliance upon the traditional practices of equity must be "conditioned by the necessities of the public interest which Congress has sought to protect." In enacting the Clean Air Act, Congress made a determination that the public interest required that substantial r[illegible]asures be taken to combat the deleterious effects of air pollution. *See* 42 U.S.C. § 7401. The district court's discretionary injunctive powers were therefore tempered by its obligation to carry out the congressional mandate contained in the Clean Air Act.

In a recent case, *TVA v. Hill*, 437 U.S. 153 (1978) (the "snaildarter" case), the Court held that the Endangered Species Act required the district court to enjoin the completion of the Tellico Dam in East Tennessee, despite the lower court's doubts about the "wisdom . . . of a particular course consciously selected by the Congress." *Id.* at 194. The Court emphasized that it is the exclusive province of Congress to formulate legislative policies and establish their relative priority. Moreover, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *Id.* Although the Court recognized that a federal court is not "mechanically obligated" to grant injunctive relief for every violation of the law, the Court concluded that the clear congressional mandate of the Endangered Species Act provided no alternative but to enjoin the completion of the Tellico Dam, regardless of the expenses that had already been incurred in its near-complete construction.

By enacting the Clean Air Act, Congress established a high priority for the control of air pollution. The legislature recognized that compliance would be expensive in some cases, but the choice was made to require compliance with the standards promulgated by EPA. Having made that choice, Congress did not contemplate that its decision would be thwarted by judicial reluctance to require compliance when enforcement proceedings are brought and liability is proven. Accordingly, this Court holds that the district court was required to order injunctive relief upon its finding of liability, once negotiations for a compliance plan broke down. A hearing to determine the presence of irreparable injury and inadequacy of legal remedy was therefore unnecessary.

Affirmed.

APPENDIX B

Order of the Court of Appeals Denying Petition for Rehearing

(Filed April 29, 1981)

No. 78-3551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE CITY OF PAINESVILLE, OHIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: KEITH and BROWN, *Circuit Judges;* WISEMAN, *District Judge**

Upon consideration of the petition for rehearing filed herein by defendant-appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Deputy Clerk

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*Honorable Thomas A. Wiseman, Jr., District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

APPENDIX C

Order of the Court of Appeals Staying Mandate

(Filed June 11, 1981)

No. 78-3551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

CITY OF PAINESVILLE,
Defendant-Appellant.

ORDER

IT IS ORDERED that the motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for sixty days from this date; provided that, if within such sixty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such sixty days of any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Memorandum and Order of the District Court

(Filed January 19, 1977)

No. C76-324

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF PAINESVILLE,
Defendant.

MEMORANDUM AND ORDER

MANOS, *District Judge*

On April 2, 1976 the plaintiff, the United States of America, filed a complaint requesting that the defendant, the City of Painesville, a municipal corporation, be enjoined from operating a steam generating coal fired power unit in violation of the Clean Air Act, 42 U.S.C. § 1857c-6(e) and the Standards of Performance For New Stationary Sources, promulgated thereunder. *See*, 40 C.F.R. Part 60. The defendant filed a motion for summary judgment on April 23, 1976, and the plaintiff filed a motion for summary judgment, as to the defendant's liability, on July 30, 1976.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 1857c-8(b)(3).

FINDINGS OF FACT

The facts of this case are undisputed: In 1966 the City of Painesville hired the engineering consultant firm of Glaus, Pyle & Schormer (Glaus) for advice on the possibility of expanding the electrical generating capacity of the Painesville Municipal Electric Utility (Municipal Electric). *See*, Painesville Ordinance No. 27-66, plaintiff's Appendix A. In 1967 Painesville city council decided that expansion of Municipal Electric was both feasible and necessary and started a construction program to build an additional coal fed electrical generating unit. The completion of Municipal Electric's expansion project was tentatively expected to be in early or mid 1972. *See*, Document 11, Appendix B.

On December 21, 1967 Painesville made its first purchase of equipment for the new generating unit; a used 25,000 kw turbo-generator at a cost of $118,000. *See*, Ordinance No. 46-67, Appendix A; Document No. 6, Appendix B. In November of 1969 Glaus submitted "specifications and proposals for pulverized coal fired steam generating unit no. 5." *See*, Document 12, Appendix B. On December 1, 1969 Painesville city council authorized the city manager to advertise for bids for the new generating unit (Unit No. 5) based on Glaus' specifications. *See*, Resolution No. 60-69, Appendix A. On April 20, 1970, after receiving bids on Unit 5, a letter of intent to enter into a contract for the construction of a boiler was sent to Combustion Engineering Inc. *See*, Document 18, Appendix B. At this point the start of construction appeared imminent. However financing difficulties caused delays and with each delay the cost of Unit 5 increased. *See*, Document 22, Appendix B. In August of 1971 Painesville discussed with Glaus ways to decrease the cost of Unit 5. *See*, Document 27, Appendix B.

On August 17, 1971 the Administrator of the United States Environmental Protection Agency (EPA) published in the *Federal Register* proposed standards for performance for new stationary sources. *See,* 36 Fed.Reg. 15704.

On September 20, 1971 Painesville informed Glaus that their services would no longer be needed. *See,* Document 11, Appendix C. On November 29, 1971 the engineering firm of Campbell, Deboe, Giese & Weber (Campbell) was hired. *See,* Resolution No. 52-71, Appendix A.

On December 23, 1971, the Standards of Performance for new source fossil-fuel fired steam generators became final. *See,* 36 F.R. 24877. Approximately one month later Campbell submitted a report on the proposed construction of Unit 5. In this report Campbell stated:

> xisting new federal air pollution regulations and proposed State of Ohio air pollution regulations which are scheduled to go into effect in February of this year are such that it is questionable if the boiler equipment is appropriate in all respects if furnished as originally contemplated. The new regulations cover emissions of particular matter, sulphur dioxide and nitrous oxides." *See,* Document 13, p. 6, Appendix C.

The report recommended a change in size of the boiler from 240,000 lbs. steam/hour (continuous rating) to 215,000 lbs. steam/hour (continuous rating). Painesville accepted the change in the boiler specifications, and on February 22, 1972 advertised for bids. *See,* Resolution 7-72, Appendix A. Bids were received and evaluated. One of the factors in the evaluation was whether the bids met the United States Environmental Protection Agency (EPA) and Ohio EPA regulations. Campbell noted that the bidders could only meet sulfur dioxide requirements by "fuel selection." *See,* Document 4, Exhibit C.

On July 28, 1972 Painesville executed a contract with Babcock & Wilcox Company for the construction of the steam generating unit of Unit 5. *See,* Appendix D, Document 5.

On May 17, 1973 the Ohio EPA found the City of Painesville was not required to meet Ohio's air quality standards contained in R.C. §§ 3704 *et seq.* because Unit 5 was not a new air contaminate source. The basis for this decision was that the contracts for purchase of the equipment for Unit 5 were made before the effective date of the Ohio Air Pollution Control Regulations, February 15, 1972. *See,* Defendant's Exhibit D. A consent and abatement order was later entered into by Painesville and Ohio EPA in which Painesville agreed to comply with Ohio particulate regulations and to burn coal containing less than 3.2% sulfur. *See,* Defendant's Exhibit B. On March 31, 1975, the EPA informed Painesville that it would not pursue enforcement of federal particulate emission standards because of the consent and abatement order, but the letter did not preclude EPA from enforcing sulfur dioxide emission standards. *See,* Document 3, Appendix D. On November 24, 1975 EPA issued notice that Painesville was in violation of 40 C.F.R. §§ 60.40 and 60.43 because it intended to burn coal with a 3% sulfur content which would cause in excess of 4.8 lbs. sulfur dioxide/million btu heat input to be emitted from Unit 5, a fossil-fuel fired steam generating unit with more than 250 million btu/hour heat input. *See,* Document 3, Appendix D. Under § 60.43 a new stationary source may emit no more than 1.2 lbs. sulfur dioxide/million btu heat input. Painesville does not contest that Unit 5's emissions violate the standards set by 40 C.F.R. § 60.43 if they apply.[1] However, Painesville claims that 40 C.F.R.

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1. Painesville admitted, ". . . we do not believe that compliance with the SO_2 emissions regulations is possible at this time.

(Continued on following page)

Part 60, Standards Of Performance For New Stationary Sources, does not apply because Unit 5 is not a new source as that term is used in 42 U.S.C. § 1857c-6(a)(2) and the regulations promulgated thereunder.

CONCLUSIONS OF LAW

The sole issue[2] for determination is whether Painesville's Unit 5 is a new source that is required to meet the regulations contained in 40 C.F.R. Part 60.[3] 42 U.S.C. § 1857c-6(a)(2) reads,

> "The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source."

Footnote continued—

We are continuing to pursue the availability of low sulphur fuels and SO_2 removal equipment, with an ultimate plan of installing such equipment when it is commercially proven and available." Letter from Joseph Pandy, Jr., Superintendent of Electrical Power to David Kee, Chief Air Section EPA Region V. Document 2, Appendix D; *see also*, Affidavit of Thomas Voltaggio, attached to motion for preliminary injunction.

2. Painesville claims that the doctrine of laches is applicable and that EPA is barred from bringing this action because EPA knew about the consent and abatement between Ohio EPA and the defendant, but raised no objection until November of 1975. The Court rejects this argument. EPA's March 31, 1975 letter informed Painesville that EPA would not enforce federal standards for particulate emissions, at that time. No mention was made of sulfur dioxide standards. Painesville, from the record before this Court, had no reason to believe the decision not to enforce particulate emission standards meant that all other federal emission standards would also not be enforced.

3. The standards set by 40 C.F.R. § 60.43 have not been attacked by the defendant. 40 C.F.R. § 60.43 had been found to be reasonably achievable, in terms of cost and available technology. *See, Essex Chemical Corporation v. Ruckelshaus*, 158 U.S.App.D.C. 360, 486 F.2d 427, 440 (1973).

Proposed regulations for new source emissions were issued August 17, 1971, *see*, 36 Fed.Reg. 15704, so that if, as of August 17, 1971, "construction" or "modification"[4] of Municipal Electric had been "commenced," Unit 5 would not be a new source and therefore sulphur dioxide emission standards promulgated under 42 U.S.C. § 1857c-6 do not apply. The words "construction," "modified," and "commenced" are not defined in § 1857c-6 but have been defined in 40 C.F.R. § 60.2(g)(h) and (i) respectively. While an interpretation of an act by the enforcing agency is not conclusive, it is entitled to "great deference," *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *see, e. g., Youakim v. Miller*, 425 U.S. 231, 235-236, 96 S.Ct. 1399, 1402, 47 L.Ed.2d 701 (1976); *Satty v. Nashville Gas Company*, 522 F.2d 850, 854 (6th Cir. 1975). Further the interpretation by an administrative agency of its own regulations is controlling unless plainly erroneous. *See, e. g., Udall v. Tallman*, 380 U.S. 1, 17, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Compton v. Tennessee Dept .of Public Welfare*, 532 F.2d 561, 565 (6th Cir. 1976).

In 40 C.F.R. § 60.2(g) "construction" is defined as the ". . . fabrication, erection or installation of an affected facility." An "affected facility" is defined in § 60.2(e) as meaning ". . . with reference to a stationary source, any *apparatus* to which a standard is applicable." (emphasis added). Standards are made applicable to fossil-fuel fired steam generators, like Unit 5, by § 60.40. A fossil-fuel fired steam generator is a boiler, see, 40 C.F.R. § 60.41(a). It follows, in this case, that the "affected facility" of Unit 5 is the boiler, because it is the apparatus to which the emission standards are applicable. Therefore it is the

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4. The defendant does not argue that the construction of Unit 5 was a "modification" or was the reconstruction of an existing facility. *See*, 40 C.F.R. § 60.2(h) and § 60.15.

date of the "commencement" of "construction" of the boiler which determines whether Unit 5 is or is not a new source.

In 40 C.F.R. § 60.2(i) "commenced" is defined as meaning,

> ". . . with respect to the definition of 'new source' in Section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification."

Using this definition EPA argues that the construction of the "affected facility," the boiler, commenced at one of two times: First, when actual construction at the building site was started for a particular type of boiler, so that modification of existing physical construction would be required if the boiler specifications were changed to accommodate anti-pollution control devices; or, second, that construction commenced at the time a contract for the purchase of a new boiler was signed, with the proviso that delivery be required within a reasonable time. The Court finds that EPA's interpretation of 40 C.F.R. § 60.2(i)[5] is fully supported by the language of that regulation.[6]

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5. Painesville argues that it was engaged in a continuous program of construction, beginning in 1967 with the purchase of the used turbogenerator, and that it therefore "commenced" construction well before August 17, 1971 and need not comply with 40 C.F.R. § 60.43. However EPA has interpreted its own regulations as focusing on when construction of the boiler, as the affected apparatus, began. This interpretation is not clearly erroneous, but is a reasonable interpretation of the language of 40 C.F.R. §§ 60 *et seq.*

6. The definition by the EPA of the term new stationary source annunciated in 40 C.F.R. § 60.2(d), (e), (g), (h) and (i)

(Continued on following page)

Applying the above definition to the facts of this case the Court finds that of August 17, 1971 "construction" of Unit 5 had not "commenced." No contract for the production of a boiler for Unit 5 had been entered into. Construction of Unit 5 had not progressed to the point that a change in its design would have required the facility already

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Footnote continued—

is consistent with what appears to have been Congress' intent in enacting 42 U.S.C. § 1857c-6. The rationale behind § 1857c-6 was Congress' desire that the best available emission control technology be incorporated into the construction of a facility which posed a threat of being a *new* air pollution source. This would prevent further environmental decay over the short run, while decreasing air pollution from current levels over the long run. Further, the economic impact would be spread over many years, and would not be as drastic as requiring existing facilities to immediately incorporate the best available anti-pollution technology. As the Senate Conference Report stated:

"The provisions for new source performance standards are designed to insure that new stationary sources are designed, built, equipped, operated, and maintained so as to reduce emissions to a minimum. The performance standards should be met through application of the latest available technology or through other means of preventing or controlling air pollution. The maximum use of available means of preventing and controlling air pollution is essential to the elimination of new pollution problems while cleaning up existing sources.

"As used in this section, the term 'available control technology' is intended to mean that the Secretary should examine the degree of emission control that has been or can be achieved through the application of technology which is available or normally can be made available. This does not mean that the technology must be in actual, routine use somewhere. It does mean that the technology must be available at a cost and at a time which the Secretary determines to be reasonable. The implicit consideration of economic factors in determining whether technology is 'available' should not affect the usefulness of this section. The overriding purpose of this section would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach." *See,* Senate Report on S. 4358.

In testimony before a house subcommittee on the administration's clean air bill, which had a section similar to 1857c-6, H.E.W. Secretary, Robert H. Finch, stated,

(Continued on following page)

erected to be modified in order to insure that it could comply with the sulfur dioxide emission standards of 40 C.F.R. § 60.43. In fact the Court finds in the record no evidence that any purchase of equipment made prior to August, 1971 would have been incompatible with a complying operation of Unit 5.[7] As is evidenced by the change in the specifications of the boiler in January of 1972, Painesville could have modified its plans for Unit 5 at a time well after the proposed regulations for new stationary sources became final,

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Footnote continued—

"In general, existing stationary sources of air pollution are so numerous and diverse that the problems they pose can most efficiently be attacked by State and local agencies. Even with air quality standards being set nationally, as proposed in the Administration bill, the steps need to deal with *existing* stationary sources would necessarily vary from one State to another and, within States, from one area to another.

"In the years ahead, however, many potentially significant new stationary sources of air pollution will come into being as a result of the Nation's growing demands for electric power, manufactured goods, and other necessities and amenities of modern life. Large stationary sources, such as electric generating plants, iron and steel mills, and petroleum refineries frequently have adverse effects not only on public health and welfare in their own communities but also on air quality over broad geographic areas. This problem is one that demands national attention. If we are ever to begin preventing air pollution, instead of just attacking it after the fact, then we must at least insure that major *new* stationary sources, wherever they are located are designed and equipped to reduce emissions to the minimum level consistent with available technology." Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce 91-44, p. 288.

Finally, Senator Cooper addressed the Senate on § 1857c-6, stated:

"The concept is that whenever we can afford or require new construction, we should expect to pay the cost of using the best available technology to prevent pollution." *See,* Legislative History of the 1970 Clean Air Act, p. 260 (Government Printing Office, Jan. 1974.) The Court concludes that the EPA's definition that a new stationary source is one in which the boiler has neither been made nor contracted for, balances the interests in pollution control and economics along the lines required by § 1857c-6.

7. The defendants were on notice of the requirements of 40 C.F.R. § 60.43. *See,* Document 4, Exhibit C.

without loss of the money previously spent on capital purchases.[8]

The Court finds that Municipal Electric's Unit 5 is a *new stationary source*[9] subject to the emission standards established by 40 C.F.R. § 60.43. Further the Court finds that the burning of coal with the sulfur content of approximately 3.0% will cause the emissions of sulfur dioxide in excess of 1.2 lbs./million btu input heat. Summary judgment on liability is granted to the plaintiff, the United States of America. The parties are ordered to prepare plans with documentation, which would allow the operation of Unit 5 in compliance with 40 C.F.R. § 60.43 and at an economically acceptable level.

IT IS SO ORDERED.

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8. EPA's interpretation of 42 U.S.C. § 1857c-6(a)(2) limits the application of new stationary source emission standards to those projects in which the construction has not progressed to the point that modifications of already completed physical structures would be necessary to meet those standards. But if the only work made fruitless by the need to meet anti-pollution standards is in the design or planning of a new source, then operators are required to modify those designs or operating plans to meet new stationary source emission standards. This interpretation is given credence by Congress' use of the word "construction" in § 1857c-6(a)(2) [sic] rather than the words "planning" or "designing."

9. Ohio EPA found that Unit 5 was not a new stationary source under Ohio law. *See*, Appendix E, Document 1. Painesville argues that EPA is bound to follow this decision. This argument ignores the fact that Ohio EPA was interpreting a different statute than EPA. Further, it is clear that Congress intended that federal enforcement of federal air pollution standards not be controlled by the states. *See, Train v. Natural Resources Defense Council Inc.*, 421 U.S. 60, 63-64, 95 S.Ct. 1470, 1474, 43 L.Ed.2d 731 (1975).

In introducing the Conferences Report to the House of Representatives Congressman Staggers stated,

"The enforcement of air pollution regulations is partly the responsibility of the States and partly that of the Federal Government. The legislation provides that the Federal Government shall have primary responsibility for the enforcement of performance standards for new stationary sources and hazardous emissions stationary sources." *See*, Legislative History of the 1970 Clean Air Act, p. 112 (Government Printing Office, Jan. 1974).

APPENDIX E

Order of the District Court Granting Permanent Injunction

(Filed June 18, 1978)

Case No. C76-324

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF PAINESVILLE,
Defendant.

ORDER

On January 19, 1977 this court granted the plaintiff, the United States of America, summary judgment on the defendant City of Painesville's liability. In its order the court stated:

> The Court finds that Municipal Electric's Unit 5 is a *new stationary source* subject to the emission standards established by 40 C.F.R. § 60.43. Further the

Court finds that the burning of coal with the sulfur content of approximately 3.0% will cause the emissions of sulfur dioxide in excess of 1.2 lbs./million btu input heat. Summary judgment on liability is granted to the plaintiff, the United States of America. The parties are ordered to prepare plans with documentation, which would allow the operation of Unit 5 in compliance with 40 C.F.R. § 60.43 and at an economically acceptable level.

Since the entering of the court's order of January 19, 1977 lengthy and thorough discussions have been held between the parties, under the court's supervision, in an attempt to devise an acceptable plan by which Unit 5 could operate at an acceptable cost *and* comply with the emission standards established by 40 C.F.R. § 60.43. At this time the court concludes that further negotiations are fruitless. Accordingly the court enters judgment of the United States of America and orders that the defendant, its officers and employees be permanently enjoined and restrained from emitting sulfur dioxide into the atmosphere from the Painesville Municipal Light Plant, Unit No. 5, in excess of 2.2 g per million cal heat input (1.2 lb. per million BTU).[1]

The effect of this order is stayed pending appeal. *See* Fed. R. Civ. P. 62.[2]

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

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1. The court has not given the defendant a grace period in which to comply with its order because he has simultaneously entered a stay of its order.

2. The necessity of the defendant posting a bond was waived by the plaintiff.

APPENDIX F

Section 111, Clean Air Act, 42 U.S.C. § 1857c-6
[later amended and recodified at 42 U.S.C. § 7411]

STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

* * * * *

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall propose regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

* * * * *

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

APPENDIX G

40 C.F.R. Part 60 (January 1, 1972)

Subpart A—General Provisions

§ 60.1 Applicability.

The provisions of this part apply to the owner or operator of any stationary source, which contains an affected facility the construction or modification of which is commenced after the date of publication in this part of any proposed standard applicable to such facility.

§ 60.2 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 1857 et seq., as amended by Public Law 91-604, 84 Stat. 1676).

(b) "Administrator" means the Administrator of the Environmental Protection Agency or his authorized representative.

(c) "Standard" means a standard of performance proposed or promulgated under this part.

(d) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(e) "Affected facility" means, with reference to a stationary source, any apparatus to which a standard is applicable.

(f) "Owner or operator" means any person who owns, leases, operates, controls, or supervises an affected facility or a stationary source of which an affected facility is a part.

(g) "Construction" means fabrication, erection, or installation of an affected facility.

* * * * *

(i) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

* * * * *

Subpart D—Standards of Performance for Fossil-Fuel Fired Steam Generators

§ 60.40 Applicability and designation of affected facility.

The provisions of this subpart are applicable to each fossil fuel-fired steam generating unit of more than 250 million B.t.u. per hour heat input, which is the affected facility.

* * * * *

§ 60.43 Standard for sulfur dioxide.

On and after the date on which the performance test required to be conducted by § 60.8 is initiated no owner or operator subject to the provisions of this part shall discharge or cause the discharge into the atmosphere of sulfur dioxide in excess of:

* * * * *

(b) 1.2 lbs. per million B.t.u. heat input (2.2 g. per million cal.), maximum 2-hour average, when solid fossil fuel is burned.

* * * * *

APPENDIX H

Opinion of the District Court in United States v. Public Service Co. of Indiana

(Filed September 30, 1977)

No. IP 76-657-C

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Defendants.

HOLDER, *D.J.*:

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND JUDGMENT

The action was commenced by the plaintiff, United States of America, with the filing of a one count complaint on November 12, 1976 against the defendant. Public Service Company of Indiana, Inc., and the action on November 12, 1976 was scheduled for trial for May 9, 1977. The trial date was vacated on the Court's own motion on May 2, 1977 because of the trial date conflicting with the Judicial Conference and reassigned for July 20, 1977 and later reassigned for July 25, 1977. The complaint was amended on February 17, 1977 and defendant filed its answer thereto on February 25, 1977 consisting of one defense of admissions and denials.

The plaintiff filed a motion for a preliminary injunction on December 14, 1976 and on December 14, 1976 the motion was scheduled for evidentiary hearing on December 21, 1976. The parties' stipulation for a continuance of the hearing was filed on December 15, 1976 and approved. The motion was amended on February 17, 1977. Plaintiff withdrew the motion on February 22, 1977 and amended the first amended complaint by deletion of the complaint's request for preliminary injunction.

Plaintiff filed a motion for partial summary judgment on June 22, 1977 and withdrew the motion on July 12, 1977.

The bench trial of the issues of the second amended complaint in one count and the answer of one defense commenced on July 25, 1977 and was concluded on July 26, 1977. The parties waived final argument and a post trial briefing schedule was ordered. The briefing schedule having been concluded and the Court being advised in the matter does now record its findings of fact, conclusions of law and judgment entry.

The United States of America through the Attorney General of the United States of America and at the request of the Administrator of the Environmental Protection Agency commenced this civil action to enjoin the defendant, Public Service Company of Indiana, Inc., a corporation, from emitting and threatening to emit sulfur dioxide from steam generating coal fired power units in alleged violation of Section 111(e) of the Clean Air Act, 42 U.S.C. § 1857c-6(e), and the Environmental Protection Agency's Standards of Performance for New Stationary Sources promulgated thereunder and relating to emissions of sulfur dioxide. Notice of the commencement of this action has been given to the Air Pollution Control Board of the State of Indiana.

The defendant is a corporation organized and existing under the laws of the State of Indiana within the Southern District of Indiana. The defendant is engaged in the business of generating, transmitting and distributing, directly or indirectly, electric energy to over 500,000 customers located in 69 of the 92 counties in the State of Indiana. The defendant owns and operates seven generating stations in the State of Indiana with a combined present generating capacity of approximately 4,300 megawatts (MW). Of defendant's total present capacity, 1,300 MW are produced by Units #1 and #2 located at the Gibson County Generating Station in Gibson County, Indiana.

Planning for the Gibson Station with a capacity for five generating units, four of which were to come on line in 1975, 1976, 1978 and 1979, commenced during the mid to late 1960's. It was determined in 1966 that additional generating capacity would be needed by defendant in 1975. Preliminary plans were begun at that time and expenditures and planning commenced in terms of engineering and financing this additional capacity. The Gibson Station was planned to operate and is operated as a base load electric generating station to serve the customers dependent on defendant for electric utility service. Preliminary reports were refined throughout the periods 1966 through 1969 and the first definitive report was submitted by consulting engineers to the Company on May 20, 1969, wherein the site of the new station was determined. By September of 1969, defendant had selected the Gibson County location for the new generating station and begun acquisition of more than 5,000 acres of land for the project located on the Indiana banks of the Wabash River approximately three miles south of Mt. Carmel, Illinois, in Gibson County, Indiana. The turbo-generator contract for two 650 MW generating units with General Electric is dated September 3,

1969. First option for purchase of over 4,500 acres of land was taken September 23, 1969. A majority of deeds for the plant site were consummated in 1970. A condemnation hearing requested by the Company was held on August 17, 1970, and public announcement of the plant project was made on August 18, 1970. At all times since its announcement in August, 1979, defendant has planned its Gibson Generating Station to contain at least four generating units and its construction of the station from its commencement by June, 1971, has been made to house and accommodate four such units. By August 11, 1971, construction work necessary to ultimate operations of Units #3 and #4 (and on a scale unnecessary to operation of Units #1 and #2 alone) was underway on the 2,950 acre cooling lake, coal handling facilities, ash handling and storage facilities, cooling water intake structure, electrical switchyard and railroad facilities. In addition, the order of construction of Units #1 and #2 was reversed to facilitate construction. The contract for two super critical Foster-Wheel boilers of 4.7 million pounds of steam per hour for the first two 650 MW units was signed November 30, 1970. The contract for sale of timber from the plant site was signed on January 21, 1971. By June, 1971, the planning of defendant's Gibson generating station was embodied in defendant's Five Year Construction Program Budget as embracing a 650,000 kw Unit #2 to be placed in service on January 1, 1975; a 650,000 kw Unit #1 to be placed in service on January 1, 1976; and an 800,000 kw Unit #3 to be placed in service on January 1, 1978; and involving a continuous program of construction and construction expenditure over the quintennial. Defendant's Five Year Construction Program Budget was updated in June, 1972, to include Gibson generating Unit #4 to go in service on January 1, 1979, and to specify Units #3 and #4 as being 650,000 kw units. The construction program

budgets for defendant's Gibson generating station have been revised from year to year thereafter. Construction on defendant's Gibson generating station has proceeded continuously since June, 1971, and construction of the four units included within it has proceeded in regular progression as a continuous program of construction and completion of the station. Construction on Units #3 and #4, considered as individual turbo-generator units separate and apart from the station, commenced on or about July 1, 1974. Contracts for site preparation were signed with Green Construction Company on July 9, 1971; actual earth moving for the plants site commenced on July 19, 1971; and Green received its first payment for site preparation on September 13, 1971. On August 17, 1971, the Administrator of the United States Environmetnal Protection Agency, published in the Federal Register proposed Standards of Performance for Fossil-Fuel Fired Steam Generators with limitations on the emission of particulate matter, sulfur dioxide and nitrogen oxides. Such Standards of Performance were not developed based on health related standards. Environmental Protection Agency's Office of Air Programs Technical Report No. APTD-0711 entitled "Background Information for Proposed New-Source Performance Standards" was part of the data supporting such proposed regulations. It stated in part:

> "The standards for sulfur dioxide are based on limited demonstrations of stack-gas desulfurization processes and on the availability of low-sulfur fuels. At this time only the lime-slurry demonstrated [sic] on large steam generators. Three other processes have been shown capable of continuous operation at smaller installations. * * *
>
> "Coal and fuel oil of low sulfur content and natural gas can be used to satisfy the standards at

many new system generators. It is not expected, however, that there will be enough low-sulfur fuel to supply all new steam generators as well as existing sources requiring SO_2 control under state implementation plans. In addition, transportation costs in many areas may make these fuels more expensive than stack-gas desulfurization.

"* * * The reimbursements for salable by-products, such as elemental sulfur and sulfuric acid, were not included as credits in the cost estimates because of the market variabilities involved, in addition, the cost for disposal of spent reagents incurred by some processes was not considered in any depth.

"The standards of performance are insensitive to cost/benefit analysis when stack-gas cleaning is employed in that it is the only control system available. Since the availability of low-sulfur fuel varies with the location of the plant, it is not possible to analyze the cost of this control strategy."

All generating units at defendant's Gibson Station are large steam generators. Environmental Protection Agency has never made a determination as to the cost of complying with the new source performance standard for sulfur dioxide by burning low sulfur coal. On December 23, 1971, the Standards of Performance for Fossil-Fuel Fired Steam Generators became final regulations. 36 F.R. 23877. On July 18, 1972, Green Construction Company commenced construction on the dike for the 2,950 acre cooling lake for approximately 3,000 megawatts of new capacity and a proposed but as yet unfinalized Unit #5. On December 14, 1973, defendant and Foster-Wheeler Corporation signed a contract for two steam generating units of 4.6 million pounds of steam per hour for use in connection with Units

#3 and #4. Each unit is a 5,884.11 million BTU per hour generating unit.

Defendant's Gibson Station Units #3 and #4 were designed to meet Environmental Protection Agency's New-Source Performance Standards for particulates and sulfur dioxide. Defendant has in good faith endeavored to comply with such standards. Thereafter defendant developed general specifications for the sulfur dioxide removal equipment to be used in the Gibson Units #3 and #4 installation. The specifications were designed to insure full and continuous compliance with Environmental Protection Agency's new source standards for sulfur dioxide emissions and sought performance guarantees on the equipment. The contract for delivery of coal for Gibson Units #3 and #4 with the Carter Oil Company is dated April 24, 1974. The coal to be delivered will contain 3.3% sulfur by weight. No adequate supplies of sufficiently low sulfur coal to meet the New-Source Performance Standards were found to be available with adequate facilities to transport it to the site of the Gibson Station, so defendant in accordance with the custom in the utility industry entered into a long-term contract with Carter Oil Company to supply approximately 3.3% sulfur content coal for Gibson Units #3 and #4 so as to insure a supply of coal during the expected life of the units of 35 years. On June 4, 1974, Sargent and Lundy, consultants and design engineers for the Gibson County Generating Station, submitted a "Scope of Work" for Units #3 and #4 to defendant for comment. During early 1974 Sargent and Lundy advised defendant that SO_2 control equipment costs would be approximately $74/Kw or $99,000,000 for both units. Construction on Units #3 and #4, considered as individual turbo-generator units separate and apart from the station facilities required for them, commenced on or about July 1, 1974. On July 8, 1974, the

Air Pollution Control Board for the State of Indiana issued a Construction Permit for Units #3 and #4 at the Gibson Station. On July 26, 1974, defendant sent to Sargent and Lundy its comments on the June 4, 1974, "Scope of Work" for the Gibson Units #3 and #4. On September 4, 1974, Ralph C. Pickard, Technical Secretary, Indiana Air Pollution Control Board, stated in a letter to Mr. Carroll H. Blanchar, Chairman and Chief Executive Officer of defendant, that "the construction permit PC (32) 712 issued on July 8, 1974, for the new generating Units #3 and #4 at your Gibson Station was based on the source meeting the New-Source Performance Standards. This requires that sulfur dioxide emissions from a source exceeding 250 million BTU per hour will not be more than 1.2 pounds per million BTU heat input." Such construction permit was issued under Indiana Air Pollution Regulation APC-19. At that time defendant and other Indiana electric utilities were parties to an action attacking the validity of that Indiana regulation and on November 10, 1975, the Circuit Court of Marion County, Indiana, entered a judgment declaring that regulation APC-19 and others are invalid for procedural deficiencies and enjoining their enforcement. The injunction has been stayed pending an appeal and an appeal is presently pending from such judgment. On November 1, 1974, Sargent and Lundy submitted to defendant condensed and detailed construction schedules for Gibson Units #3 and #4. By letter through Sargent and Lundy, defendant invited bids for equipment to control emissions of sulfur dioxide from Gibson Units #3 and #4. The requested bids were due on or before July 11, 1975. Plaintiff challenges the guarantee specifications as being unreasonably strict and more than is required of any other major piece of equipment, but the fact remains that other equipment does not have to meet a strict law-imposed standard for equipment performance, whereas the emission control

equipment has as its sole function the responsibility of causing the unit to operate without violating applicable limitations imposed by law, and, since defendant's Gibson Station is a base load generating station, the equipment must operate substantially continuously in compliance with such legal requirements. During July of 1975 bids were received from eight of the eleven vendors to whom requests for bids for SO_2 equipment were addressed. Of those eight who submitted bids, one bidder—Foster-Wheeler—submitted a bid for a regenerable system which was deemed unresponsive by defendant. Thus seven companies out of eleven receiving invitations submitted bids and all proposed a lime or limestone scrubbing system which is a throwaway system, rather than a system which produces a salable by-product. None of the suppliers of regenerative systems invited to bid were willing to propose a full scale unit. The quoted base material and erected prices received by defendant from six of the seven bidders for one unit ranged from $19,900,000 to $25,800,000 and for two units ranged from $36,800,000 to $51,500,000. The seventh bidder—M. W. Kellogg—quoted base material and erected prices at $60,168,000 for one unit and $120,336,000 for two units. The M. W. Kellogg bid included sludge preparation costs and unlike all other bidders did not quote escalatable prices but quoted firm prices. An analysis of four bids deemed best by defendant showed aggregate capital costs (present worth at January 1, 1978) for Gibson Units #3 and #4 over an assumed thirty year life of the scrubber equipment ranging from $108,967,000 to $111,006,000, and aggregate operating costs (present worth at January 1, 1978) ranging from $205,500,000 to $253,240,000. Annualized costs (both capital and operating would range from $34,183,000 per year to $39,243,000 per year. These capital and operating costs would result in increasing defendant's electric utility rates to its customers by 8% to

10%. Mr. W. O. Montgomery, Vice President-Engineering for defendant, wrote to James McDonald, Director, Enforcement Division, United States Environmental Protection Agency, Region V, on August 19, 1975, requesting a meeting to discuss alternatives to scrubbers for Unit #3. The letter stated that by September 1, 1975, defendant "must place an order for scrubber hardware in order to start Unit No. 3 operation with constant emission control." Both Unit #3 and Unit #4 at the Gibson Station were designed for and will have a maximum rated capacity of 5,884.11 million BTU per hour (BTU/hr). Unit #3 and Unit #4 have been designed and are being equipped with the best available equipment to control emissions of particulate matter. No control equipment is planned for the control of emissions of sulfur dioxide from Unit #3. Unit #3 and #4 will each have a pulverized coal dry bottom boiler. Unless operated with sufficiently low sulfur content coal or with appropriate control equipment, the operation of the units will emit into the atmosphere gases containing sulfur dioxide in amounts approximately 5.80 lb. per million BTU heat input. Pulverized coal is a solid fossil fuel. Units #3 and #4 were designed for and space was allocated in the plant layout for control equipment to remove SO_2 from the flue gas to meet an emission limit of 1.2 lb. SO_2 per million BTU heat input. When burned in Units #3 and #4 at the Gibson Generating Station, 3.3% sulfur coal will result in emissions of about 5.8 lb. of SO_2 per million BTU heat input. By letter of January 21, 1976, to defendant Sargent and Lundy recommended that Research Cottrell be awarded the contract to furnish and erect the Gibson Generating Station sulfur removal system for Units #3 and #4 and that a testing program be made to determine how to dispose in an environmentally acceptable manner of the waste produced by such sulfur removal system. The Gibson Generating Station site is constructed in a flood

plain. A lined pond, assuming one were constructed in the vicinity of the Gibson Generating Station, would have to be constructed in a flood plain; the soil and hydrology of the area adjacent to the Gibson Generating Station would prevent the use of an unlined pond to dispose of sludge. No liner for a sludge pond has been demonstrated effective as a permanent solution of the sludge containment problem. The cost of obtaining lime for one unit at the Gibson Generating Station over the life of the plan would be $80,-468,000 and the cost of obtaining limestone for one unit over the life of the unit would be $31,115,000. Disposal of lime sludge (dry) over the life of one unit comparable to Gibson Unit #3 would require 3,800 acre feet and for limestone sludge (dry) would require 3,200 acre feet. The annual tonnage of sludge from one unit comparable to Gibson Unit #3, assuming a 55% capacity factor and the use of a lime scrubber, would be 330,000 tons (assuming 60% solids-40% moisture) and the annual tonnage, assuming limestone, would be 430,000 tons (assuming 60% solids-40% moisture). Defendant does not have sufficient land at its Gibson Generating Station site to store untreated sludge disposal from lime or limestone scrubbers, and it could not store chemically treated sludge at the site without absolute assurance that it will not leach into ground water. Untreated sludge could not be stored at the Gibson Generating Station site or on land immediately adjacent thereto without a lined pond and adequate diking. The cost of a lined pond, assuming one were constructed, would be approximately $10,000,000. All present systems for treatment of sludge are either experimental or demonstrate installations so new that their efficiency has not been fully tested. Defendant could operate all four units at its Gibson Generating Station so as to meet the primary national ambient air quality standards promulgated under the Clean Air Act without making any change or additions to Units

#3 and #4 as the same are now being constructed and installed and without any change in present coal supply arrangements for those units other than to have a supply of lower sulfur coal available to burn when atmospheric conditions so require. By letter of February 10, 1976, Russell W. Rink, Vice President, Purchasing for defendant, notified remaining bidders that defendant was unable to decide on the purchase of SO_2 removal equipment for Units #3 and #4 and not to hold production space open. In late 1975 and early 1976, there was no commercially established flue gas scrubber equipment for an installation comparable to Gibson Units #3 and #4. While reserves of coal with sulfur content low enough to be usable in compliance with the new source standards without the necessity of scrubbers do exist, a supply adequate for defendant's Gibson Units #3 and #4 would require combining the holdings of a number of suppliers and the transportation problems and logistics of moving such coal to defendant's Gibson Station makes use of such coal, even on an interim basis, impractical and an unreasonable economic burden on the defendant customers. Coal costs would be increased by $60,000,000 to $83,000,000 per year and a new investment of $133,000,000 would be required in transportation facilities. Although increased coal costs would terminate if low sulfur coal were used as an interim compliance measure, capital investment in railroad rolling stock and trackage, barges, barge transfer facilities and trucks would be necessary even over the short term and would thereafter be of no use and constitute waste. The additional coal costs alone would increase customer rates by 10% to 11% if low sulfur coal were used as an interim compliance measure during construction of FGD equipment and by 13-16% if low sulfur coal were adopted as a long-term compliance method. Although compliance with the standards by use

of low sulfur coal may be a feasible option for many western and some eastern utilities located near low sulfur coal fields or on adequate railroad water routes, compliance with the new source performance standards by burning low sulfur coal at Gibson Units #3 and #4 would be substantially more expensive than compliance by means of FGD systems; because of the lack of reliable sources and transportation problems compliance with the new source performance standards by burning low sulfur coal at Gibson Station is not feasible. There is no commercially established regenerative system for use with flue gas scrubber equipment on generating units the size of Gibson Units #3 and #4. While some of the now installed flue gas scrubber equipment are being used, there is none working satisfactorily in any installation involving the site problems and limitations imposed by conditions at defendant's Gibson Station. Of the scrubber installations claimed by plaintiff to be working satisfactorily and to be workable models for defendant's Gibson Units #3 and #4, Kansas City Power & Light Company's LaCygne installation involves nighttime cutbacks for maintenance and operates open loop by discharging sludge liquid overflow into an outside pond. The next unit at that station will use low sulfur coal for compliance. Northern States Power's Sherburn County station uses low sulfur coal, is not a base load operation and operates open loop. Pennsylvania Power Company's Mansfield station has a nighttime cutback and operates open loop by discharging sludge liquid overflow into a river. It also showers a discolored mist all over a nearby city. Defendant's Gibson Station cannot be operated open loop because it cannot be allowed to discharge sludge liquid into the Wabash River or into the flood plain; and it is to be a base load operation. No specific scrubber system is known to be practical for use

to bring defendant's Gibson Units #3 and #4 into compliance and effectively produce power. If Gibson Station Units #3 and #4 are not put in service serving defendant's customers dependent on it for electric utility service reasonably near their scheduled in-service dates in early 1978 and 1979, respectively, the consequence will be to reduce the generating capacity of defendant to a dangerously low point where its reserves would be inadaquate to meet any substantial emergency or to carry out proper maintenance necessary to keep the equipment in an economic and reliable operating condition and will likewise have a similar effect on the K.I.P. pool (consisting of Kentucky Utilities, Inc., East Kentucky Power Co-operative, Inc., Indianapolis Power & Light Company and defendant). Defendant would be deprived of some $150,000,000 power sales to pool members and would have to purchase approximately $40,000,000 of replacement energy from neighboring utilities. The financial losses occasioned by such a deferral of in-service dates would have a substantial adverse effect on defendant's customers and there is no public benefit to be realized from such a shutdown. Defendant proposed that, in view of the uncertainties as to the workability of existing sludge disposal or treatment systems, its Gibson Station Units #3 and #4 be used as test facilities to develop a commercially workable and acceptable technology to produce a commercially salable end-product instead of sludge and one which could be safely stored or disposed of in case the market for the end-product should become glutted or otherwise unable to handle additional supply. If such system can be developed, the public interest will be advanced by having a useful end-product instead of another dump and the system can serve as a prototype for future coal-fired generating stations. A reasonable timetable for compliance on this basis is as follows:

Event	*Months After Order*
Test Module	
Start Specification	
Specification for bids	4
Bidders response	7
Award of contract	10
Procure and install equipment	34
Test and evaluation complete	48
Full Scale	
Specification for bids	47
Bidders response	48
Contract award	50
Construction, installation and start up of full scale scrubbers for Gibson Units #3 and #4	83

This timetable contemplates that Gibson Station Units #3 and #4 will be in operation during the above periods and that the sulfur dioxide removal system will be phased in at the dates shown. Pending final operation of the complete sulfur dioxide removal systems, defendant will be required to monitor continuously ground level concentrations and to take all steps necessary to keep the operation in compliance with the primary national ambient air quality standards promulgated under the Clean Air Act. A complete shutdown of Gibson Station Units #3 and #4 until defendant can make them comply with Environmental Protection Agency's New-Source Performance Standards is not in the interest of the public in the State of Indiana dependent on defendant for electric utility service. Unit #2 at the Gibson Station commenced commercial operation on April 15, 1975, and Unit #1 commenced commercial operation on May 3, 1976.

The Court has jurisdiction of the parties and subject matter of the action, 28 U.S.C. § 1345 and § 113(b) of the Clean Air Act (42 U.S.C. § 1857c-8(b)).

The plaintiff has failed to prove all of the alleged facts of each of the essential legal elements of the second amended complaint by a preponderance of all of the evidence.

Environmental Protection Agency's New-Source Performance Standards which are sought to be enforced in this action are the standards applicable to sulfur dioxide emissions from coal-fired steam generators. Such regulations were the subject of judicial review pursuant to the terms of the Clean Air Act and on that review were determined to be defective for failure to consider the counter-environmental effects of the process relied upon to support the prescribed standards; they were, therefore, remanded to Environmental Protection Agency for further proceedings. No final Agency action has been taken to comply with the remand order and there is no valid regulation in effect to be enforced. *Essex Chemical Corporation vs. Ruckelshaus* [5 ERC 1820] (D.C. Cir. 1973), Cause No. 72-1079, 486 F.2d 427, *cert. den.* subnom. *Appalachian Power Co. v. Environmental Protection Agency* (1974), 416 U.S. 969 [6 ERC 1512].

Since Environmental Protection Agency has never taken into account, or made any determination as to, the costs of compliance with its sulfur dioxide new source performance standards by use of low sulfur coal, burning such coal does not constitute a "system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator [has] determine[d] [to be] adequately demonstrated," as required by § 111(a)(1) of the Clean Air Act.

Although burning low sulfur coal may be regarded as a method of compliance to be used at the option of the owner or operator of a new source, it is not a method of compliance which may be lawfully required in any case in which the costs of compliance by its use substantially exceed the cost of lime or limestone scrubbing, because the latter system of emission control is the only one Environmental Protection Agency has determined to be adequately demonstrated, taking into account the cost, as required by § 111(a)(1) of the Clean Air Act.

Gibson Units #3 and #4 are, therefore, among the sources referred to by the *Essex* court as "those coal-fired steam generator plants which must use a lime slurry scrubbing system as the only means of achieving the standards" (486 F.2d 441.) Accordingly, Gibson Units #3 and #4 may not be subjected to enforcement of any remnant of the new source performance standard for sulfur dioxide which survived *Essex*.

If and when Environmental Protection Agency does take final action to respond to the reviewing court's remand order, the date of publication of the proposed regulation within the meaning of § 111(a)(2) of the Clean Air Act will be no earlier than September 10, 1975, the date of Environmental Protection Agency's proposed response to the reviewing court's remand order, and the final sulfur dioxide New-Source Performance Standard will be applicable to stationary sources, the construction or modification of which was started after that date. 40 F.R. 42045. No final response has been published or submitted to that court and Environmental Protection Agency has taken no final position on what, if any, methods are available to dispose of the sludge resulting from lime or limestone slurry scrubbing systems without being exorbitantly costly in a economic or environmental way so as to meet the re-

quirements of § 111(a)(1) of the Clean Air Act (42 U.S.C. § 1857c).

Under § 111 of the Clean Air Act (42 U.S.C. § 1857c) the "new source" controlled by the New-Source Performance Standards is for purposes here pertinent the entire steam electric power plant rather than the individual steam boilers or turbo-generator units in such plant. Environmental Protection Agency's regulations at 40 C.F.R. § 60.2(d), (e), (g) and (i) in defining the "new source" to be the specific piece of apparatus are invalid as contrary to the Clean Air Act.

Defendant's Gibson Generating Station, including generating Units #1, #2, #3 and #4, does not constitute a "new source" subject to § 111 of the Clean Air Act (42 U.S.C. § 1857c) or the Environmental Protection Agency regulations sought to be enforced in this action.

Should there be some post trial action of the Environmental Protection Agency that is legally accepted that would warrant the Appellate Court's finding that defendant would be in violation of § 111(e) of the Clean Air Act (42 U.S.C. § 1857c) and/or should an Appellate Court otherwise conclude that defendant is in violation of § 111(e) of the Clean Air Act (42 U.S.C. § 1857c) then this Court further concludes as follows:

A) In light of Environmental Protection Agency's failure to take any final administrative action on the question of how to solve the counterenvironmental effects of the sludge produced by scrubbers used as flue gas desulfurization ("F.G.D.") equipment and of the fact that such scrubbers were the only F.G.D. equipment quoted in response to defendant's invitation for bids on compliance apparatus, and of the great expense of such equipment which would be wasted if it could not be used because of

such counter-environmental effects, defendant's failure to commit such expenditures for equipment not shown to be environmentally acceptable constituted action in good faith.

B) Environmental Protection Agency's delay in taking final administrative action on the response to the remand order of the reviewing court in Cause No. 72-1079 in the United States Court of Appeals for the District of Columbia is unreasonable and has left in doubt just what will be the final New-Source Performance Standards applicable to sulfur dioxide emissions from coal-fired steam generators.

C) Any order against defendant requiring compliance with Environmental Protection Agency's New-Source Performance Standards applicable to sulfur dioxide emissions from coal-fired steam generators should be conditioned to provide defendant a reasonable period for compliance after Environmental Protection Agency takes final administrative action on the question of how to solve the counterenvironmental effects of the sludge produced by F.G.D. equipment.

D) Operation of defendant's Gibson Station in compliance with the national ambient air quality primary standards will protect the public health from the adverse effects of sulfur dioxide with an adequate margin of safety.

E) Defendant's proposed compliance schedule as described in the findings is reasonable and should be embodied in a compliance order which shall permit defendant to operate Gibson Station Units #3 and #4 so long as defendant is proceeding in good faith to meet such compliance schedule and so long as such operations are conducted in compliance with the national ambient air quality standards under the Clean Air Act.

The action is being prosecuted upon a precise theory and the Court does not conclude upon whether or not defendant is about to violate some other State or Federal statute or regulation, or the common law of the State of Indiana. The statute in question was conceived in the era of the use of natural gas and oil for fuel, which fuels are now and for the foreseeable future are and will be in short supply. Industry consequently is requiring more coal and the demand reduces the supply of low sulfur coal. Plaintiff has in effect left it up to the ingenuity of the industry to develop a practical way to use high sulfur coal. It appears that industry has and defendant is willing to and ready to experiment for improvement in the use of high sulfur coal and defendant should not be confined to the unproven expensive experiments of others in the industry.

The law is with the defendant and against the plaintiff.

The defendant is entitled to a judgment of dismissal of the action with prejudice.

JUDGMENT

It is therefore ADJUDGED and DECREED that the plaintiff take nothing by this action and the action be and is hereby DISMISSED with prejudice.

APPENDIX I

Opinion of the District Court in City of Hamilton v. Gardebring

(Filed May 26, 1981)

Civil No. C-1-79-552

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CITY OF HAMILTON,
Plaintiff,

v.

SANDRA S. GARDEBRING, et al.,
Defendants.

FINDINGS OF FACT,
OPINION AND
CONCLUSIONS OF LAW

This matter is before the Court following presentation of testimony and evidence on one issue in the above entitled case. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure the Court severed the question of when construction commenced on an installation of plaintiff known as Boiler No. 9. This case involves a question of compliance by plaintiff with the Clean Air Act, 42 U.S.C. §7401-7642.

In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law on this issue alone. Determination of all other issues herein will await the presentation of evidence thereon.

I

FINDINGS OF FACT

1. Plaintiff the City of Hamilton (Hamilton) is a municipal corporation located in Butler County, Ohio. It operates a municipal electric plant that generates electricity for distribution and sale. Defendant, the United States Environmental Protection Agency (EPA) is the agency that administers the Clean Act.

2. In 1967 Hamilton foresaw a need for additional electric generating capacity. It employed engineers to make study of the necessary improvements. In 1969 a report of such engineers was submitted recommending that the city go forward with an expansion program. The report recommended a two phase expansion. Phase One involved the removal of four old boilers and a smokestack, installation of a gas turbine, and the conversion of a coal boiler. Phase One was undertaken and completed. It added generating capacity of sixteen megowatts [sic] to the plant. It is undisputed that Phase One was completed prior to August 17, 1971. The gas turbine was designed for use either in contributing to the base load or for use at times of peak capacity. When used in the latter mode it could be brought on line faster but less efficiently.

3. In January of 1971 Hamilton authorized the preparation of plans and specifications for Phase Two. This improvement included the design and installation of Boiler No. 9, the subject of the dispute before the Court.

In May of 1971 a rate study authorized in November of 1970 for purposes of paying for the improvement was completed and an ordinance was passed in June of 1971 to adopt new rates. On June 16, 1971, Hamilton solicited bids for the construction and installation of Boiler No. 9. On July 22, 1971 such bids were opened.

In July of 1971 the engineers were paid $80,000.00 and the City Manager was authorized to enter into an agreement with such engineers to perform engineering services for the implementation of Phase Two. At the same time counsel were retained to oversee the issuance of revenue bonds for the funding of Phase Two.

On September 17, 1971, a Letter of Intent was sent by Hamilton to Combustion Engineering, Inc. indicating an intent to enter into a contract for the construction of Boiler No. 9. A contract was entered into on November 3, 1971. The Charter of the City of Hamilton requires that there be funds on hand before the city may obligate itself on a contract and until November 17, 1971, when revenue bonds were sold, such funds were not on hand.

4. On August 17, 1971, the Administrator of the EPA published in the Federal Register proposed standards for the performance of new stationary sources. 36 Fed. Reg. 15704. On December 23, 1971, the standards of performance for new source fossil fuel fired steam generators became final. 36 Fed. Reg. 24877. Both the boilers in Phase One and Boiler No. 9 are fossil fuel fired steam generators.

5. While plaintiff at all times contemplated the ultimate improvement of its electric generating facility to require both Phase One and Phase Two, the installation of improvements under Phase One were self-contained in that they did not depend upon the installation of Boiler No. 9 to operate. For the period beginning August, 1971, when Phase One was completed, and June, 1975, when Boiler No. 9 was completed, the units of Phase One did in fact operate separate and apart from Boiler No. 9.

6. On August 17, 1971, Boiler No. 9 was neither under construction nor the subject of a binding contract for construction.

II.

OPINION

The question presented to the Court in this matter is identical to the question decided by The Honorable John Manos, Judge of the United States District Court for the Northern District of Ohio, in the case of *United States of America v. City of Painesville,* 431 F. Supp. 496 (N.D.Ohio 1977). In the *Painesville* case Judge Manos found that a contract for the boiler involved in the suit was entered into on July 28, 1972. He held that since the construction had not been commenced on August 17, 1971, the boiler was a "new source" as defined in 42 U.S. Code § 7411(a)(2).

The United States Court of Appeals for the Sixth Circuit has recently considered the *Painesville* case and affirmed Judge Manos's decision, *United States of America v. City of Painesville,* ..... F.2d ..... (6th Cir. March 26, 1981). At page six of the Slip Opinion the United States Court of Appeals for the Sixth Circuit made the following statement:

> The statute [42 U.S.C. ¶7411(a)(2)] unambiguously establishes the benchmark for determining which sources of a particular pollutant are new sources. . . . A source whose construction commenced after such publication [August 17, 1971] is subject to the new source standards whatever they might be or become . . . .

Based upon this holding and Finding of Fact 6, this Court must now find that Boiler No. 9 was a "new source" and subject to the new source standards of the EPA.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction in accordance with 28 U.S.C. §1331.

B. A boiler, the construction or modification of which has been commenced after August 17, 1971, is a "new source" and subject to the performance standards proposed by the Environmental Protection Agency on that date. *United States of America v. City of Painesville,* ..... F.2d ..... (6th Cir. 1981).

C. The activities of Hamilton prior to August 17, 1971 did not constitute construction or modification of Boiler No. 9.

D. Plaintiff's prayer for an injunction prohibiting any enforcement action against the City of Hamilton for failure to operate Boiler No. 9 in compliance with new source performance standards for sulfur dioxide should be and is hereby DENIED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN

Chief Judge United States District Court

Opposition

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No. 81-164

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF PAINESVILLE, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court must hold an evidentiary hearing before enjoining a municipal electrical generation plant to operate its boiler in conformity with new sources performance standards promulgated pursuant to Section 111 of the Clean Air Act, 42 U.S.C. (Supp. III) 7411, when the court has found the boiler subject to and in violation of the standards, has allowed the parties an extended opportunity to negotiate a compliance schedule, which did not lead to an agreement, and where neither party requested an evidentiary hearing.

2. Whether Section 111 of the Clean Air Act, which provides that any stationary source of air pollution built after the publication of an applicable proposed or final new source performance standard must be operated in conformity with the standard, should be denied effect as to a particular standard in an enforcement action, where a court reviewing the standard in separate proceedings had remanded the record to the EPA Administrator for further consideration of an issue, without vacating or staying the standard, and the standard was ultimately reaffirmed by the Administrator and further judicial review proceedings abandoned.

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In the Supreme Court of the United States

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CITY OF PAINESVILLE, OHIO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 644 F.2d 1186. The opinion of the district court (Pet. App. A20-A29) is reported at 431 F. Supp. 496. The June 18, 1978, order of the district court (Pet. App. A30-A31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1981. A petition for rehearing was denied on April 29, 1981 (Pet. App. A18). The petition for a writ of certiorari was filed on July 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *The sulfur dioxide standard of performance.*—Section 111(b)(1)(B) of the Clean Air Act, 42 U.S.C. (Supp. III) 7411(b)(1)(B),[1] requires the Administrator of the Environmental Protection Agency (EPA) to establish maximum allowable emission standards, called "standards of performance," for specific air pollutants emitted by new sources. A new source is defined as a stationary source constructed or modified after the standard of performance for the pollutant the source emits has been published in final or proposed form, whichever comes sooner. Section 111(a)(2), 42 U.S.C. (Supp. III) 7411(a)(2); *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980).

On August 17, 1971, the standard of performance for new fossil fuel-fired steam generators (*i.e.*, boilers) was proposed by EPA at 36 Fed. Reg. 15704, 15705 (1971). It was promulgated on December 23, 1971, at 36 Fed. Reg. 24876, 24878, and codified at 40 C.F.R. 60.40 *et seq.* The standard includes emission limits for the pollutants sulfur dioxide, particulate matter and nitrogen oxides. The standard was challenged by utility companies in *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974). In *Essex* (486 F.2d at 440), the court of appeals held that the standard was achievable and based on adequately demonstrated control systems,

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[1] References here are to the Act as amended by the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.* Section 111 of the Clean Air Act was codified at 42 U.S.C. 1857c-6 until the enactment of Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.*, which amended Section 111 in respects not material here and recodified Section 111 at 42 U.S.C. (Supp. III) 7411.

as required by Section 111(a)(1) of the Clean Air Act, 42 U.S.C. (Supp. III) 7411(a)(1). However, the court remanded that record to the Administrator for further consideration of only adverse environmental effects of applying the standard to generating plants that must use lime slurry scrubbing systems to achieve the emission limit for sulfur dioxide. These scrubbing systems, though effective in lowering sulfur dioxide emissions, produce a solid waste sludge, the effects of which EPA had not sufficiently considered, the court concluded. 486 F.2d at 441. The court explained that "[w]e only want to be sure in view of the significant problem posed in the record that the Administrator has acted reasonably in promulgating the standard." *Ibid.* n.51. The court did not vacate, or invalidate any part of the standard. EPA reconsidered the adverse effects of scrubber sludge, and in 1975 published notice that it had determined that no change in the emission limit for sulfur dioxide was warranted. 40 Fed. Reg. 42045 (1975). After public comment, the Agency confirmed that view. 42 Fed. Reg. 61541 (1977).

B. *Factual background.*—On April 2, 1976, the United States filed a complaint alleging that the City of Painesville, Ohio, was operating a coal-fired, steam generating boiler in Unit No. 5 of its electrical generation plant, in violation of Section 111 of the Clean Air Act and the regulations promulgated thereunder by emitting sulfur dioxide in excess of the 1.2 lbs. per million B.T.U. allowed by the standard for new coal-fired steam generators (Pet. App. A3). The United States sought to enjoin the petitioner to burn coal with a sulfur content low enough to comply with the standard, and to require the petitioner to submit a plan to the court for achieving compliance with the emission standard. Petitioner moved for summary judgment, alleging that the only issue to be decided

by the court was whether construction of the boiler began before August 17, 1971 (J.A. 31, 33).[2] Petitioner did not deny that if construction of the boiler had begun after that date, the boiler was a new source subject to the standard of performance, or that the boiler would violate the standard (see J.A. 31-34; Pet. App. A4). The government filed a cross-motion for summary judgment.

On January 19, 1977, the district court granted the government's motion for summary judgment (Pet. App. A20-A29), finding that the boiler was a new source subject to the emission standards of 40 C.F.R. 60.43 (1976), and that the operation of the boiler violated the emission standard for sulfur dioxide. The court ordered the parties to prepare a plan for compliance "at an economically acceptable level" (Pet. App. A29).

One and one-half years later, on June 18, 1978, the court issued an order permanently enjoining the City from emitting sulfur dioxide from the boiler in excess of the new source standard. The court stated that it had ordered this injunction only after "lengthy and thorough discussions * * * between the parties, under the court's supervision" had failed to produce "an acceptable plan by which Unit 5 could operate at an acceptable cost *and* comply with the emission standards established by 40 C.F.R. § 60.43" (Pet. App. A31). The court concluded that "further negotiations are fruitless" (*ibid.*). Neither party requested an evidentiary hearing or objected to the entry of the injunction without such a hearing.[3] The district

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[2] "J.A." refers to the Joint Appendix filed in the court of appeals.

[3] Indeed, petitioner's motion for summary judgment was the only pleading ever filed by petitioner in the district court prior to filing of its notice of appeal from the entry of the injunction (see J.A. 1).

court, apparently acting *sua sponte*, stayed its order pending appeal, and explained that "[t]he court has not given defendant a grace period in which to comply with its order because he has simultaneously entered a stay of its order" (Pet. App. A31 & n.1).

On March 26, 1981, the court of appeals affirmed (Pet. App. A1-A17), holding that the boiler was a new source subject to the performance standard and that the district court had not erred in issuing the injunction without an evidentiary hearing. It was on this appeal that the City raised, for the first time, the argument that the *Essex* litigation had invalidated the standard of performance.

ARGUMENT

The decision below is correct and does not present any issue warranting review by this Court.

1. Petitioner contends (Pet. 10-15) that the court of appeals erred in holding that no evidentiary hearing was required. Although the petitioner argued in the court of appeals that the district court was required to hold an evidentiary hearing prior to issuing the injunction, petitioner never requested such a hearing. Petitioner has not suggested that it was unfairly surprised by the district court's action and the district court's order precludes any such assertion (see Pet. App. A31). Having failed to raise the issue in the district court, the City should be precluded from asserting it here as error. *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941).

In any event, in the circumstances of this case, the court of appeals correctly held that an evidentiary hearing was not required prior to issuance of an injunction. The court of appeals properly recognized that "the district court's discretionary injunctive

powers were * * * tempered by its obligation to carry out the congressional mandate contained in the Clean Air Act" (Pet. App. A16).

The principles underlying the decision below are well established. As petitioner observes (Pet. 10-11), in *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), this Court held that Congress' enactment of a statutory prohibition does not impose "an absolute duty" upon a court hearing an enforcement action to issue an immediate injunction barring violation of the statute "under any and all circumstances." However, in *Hecht Co.*, the Court merely reversed a court of appeals' decision holding that the district court had erred by exercising any measure of discretion whatsoever when it refused to enjoin a violation of the Emergency Price Control Act of 1942, upon finding that the issuance of an injunction would be both superfluous and an an empty formality. See *TVA* v. *Hill*, 437 U.S. 153, 193-194 (1978). As the court of appeals properly noticed, the *Hecht Co.* Court emphasized that "when a court is called upon to enforce a federal statutory injunction, its reliance upon the traditional practices of equity must be 'conditioned by the necessities of the public interest which Congress has sought to protect' " (Pet. App. A16, quoting *Hecht Co.*, *supra*, 321 U.S. at 330). The Court did not hold that no injunction was warranted in *Hecht Co.* (see 321 U.S. at 331), and it stressed that "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Ibid.*

When Congress forbids an activity by statute, an injunction may be the only remedy that adequately

vindicates the congressional policy. *United States* v. *San Francisco*, 310 U.S. 16, 30-31 (1940). For instance, in *TVA* v. *Hill*, *supra*, 437 U.S. at 194, the Court upheld an injunction against closing of the Tellico Dam, where it was undisputed that closing the dam would eradicate the snail darter from its natural habitat, an irreversible act in contravention of the clear requirements of the Endangered Species Act of 1973, declining to substitute its own view of good public policy for Congress' judgment. The Court noted (*ibid.*) that *Hecht Co.* v. *Bowles*, *supra*, was not inconsistent with the result reached, inasmuch as Congress had unmistakably signalled that federal activities such as the operation of the dam were to be subject, without qualification, to the requirements of the Endangered Species Act, and that the policy of that Act outweighs competing public purpose. See note 5, *infra*.

These principles govern the instant case. The legislative history of the Clean Air Act Amendments of 1970 shows that Congress considered control of air pollution essential to the protection of the health and welfare of the Nation. A key element of the statutory scheme to improve air quality is the provision for new source performance standards in Section 111. This provision, requiring the installation of the most effective pollution-controlling technology in all new facilities, prevents less polluted states from attracting industry with more lenient state pollution standards, and thus prevents the deterioration of America's remaining cleaner air. 116 Cong. Rec. 32918-32919 (1970) (remarks of Sen. Cooper); *National Asphalt Pavement Association* v. *Train*, 539 F.2d 775, 783 (D.C. Cir. 1976); *Asarco Inc.* v. *EPA*, 578 F.2d 319, 327-328 (D.C. Cir. 1978). In enacting Section 111, Congress balanced the short-term costs

of compliance against the long-term costs of new air pollution sources, and decided to impose the compliance cost on new sources. S. Rep. No. 1196, 91st Cong., 2d Sess. 16 (1970).

This considered congressional decision simply leaves no room for the far-ranging, unstructured reexamination of policy considerations, including those unrelated to the objectives of the Clean Air Act, proposed by petitioner (see Pet. 14-15). Among the matters to be weighed are, in petitioner's view, the cost of compliance, questions of municipal finance law, and the effect of the decision upon the petitioner's bondholders (*ibid.*). This tardily proposed judicial examination of the wisdom of the new source performance standard, as applied to petitioner's facility, stands in marked contrast to the narrow focus of analysis in *Hecht Co.*, *supra*, 321 U.S. at 326, where the district court had concluded that an injunction could in no respect increase compliance with the law, because the defendant was already employing all necessary and available means to conform to the price control law and remedy past violations. No comparable considerations have been suggested by petitioner in this case, even at this late date.

Rather, petitioner stresses the costs that will be incurred by its ratepayers, taxpayers and bondholders *whenever* its facility is converted to comply with the Clean Air Act (see Pet. 21-22 & nn.5-6). There is no suggestion that further delay will avert any dislocation that would result from this transition. Thus, the gravamen of petitioner's argument is that it should be excused in perpetuity from its obligation to comply with the Clean Air Act. In the face of the strong congressional mandate for enforcement of the new source performance standards, the equi-

table discretion of the district could in no event sanction this result.[4]

We do not suggest, nor do we read the court of appeals to hold, that the district court was stripped of all equitable discretion. Rather, the court held, consistent with *Hecht Co.*, *supra*, that the policy of the Clean Air Act "tempered" the exercise of discretion (Pet. App. A16). The district court did not order an immediate cessation of petitioner's operations in violation of the new source performance standard upon finding a violation. Instead, the court exercised its equitable discretion to allow the parties almost a year and a half to reach an agreed-upon compliance schedule that would accommodate petitioner's special concerns (Pet. App. A29, A31). The court supervised these proceedings, and resorted to an injunction only when it became clear that a stalemate had developed. Even then, the court did not require immediate compliance with the new source performance standard, but entered a stay pending appeal for the express purpose of accommodating petitioner's needs (Pet. App. A31 n.1). It is now more than three years later, and the petitioner has yet to be compelled to bring its boiler into compliance with the Clean Air

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[4] Petitioner's contention is essentially a challenge to the reasonableness of the new source performance standard itself, as applied to its facility. Cf. *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 80-83 (1980). Such a challenge is impermissible, given petitioner's failure to challenge the standard directly in the court of appeals, pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. (Supp. III) 7607(b), and the fact that the standard was upheld in judicial review proceedings (see pages 2-3, *supra*). The Clean Air Act precludes review of standards in enforcement proceedings such as this where review was available in the court of appeals. Section 307(b)(2), 42 U.S.C. (Supp. III) 7607(b)(2).

Act (see Pet. 21). In the circumstances, the court of appeals properly held that "once negotiations for a compliance plan broke down" a "hearing to determine the presence of irreparable injury and inadequacy of legal remedy was * * * unnecessary" (Pet. App. A17).[5]

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[5] In *Romero-Barcelo* v. *Brown*, 643 F.2d 835 (1st Cir. 1981), petition for cert. pending, No. 80-1990 (filed May 26, 1981), the court of appeals overturned the district court's exercise of discretion in declining to order the United States Navy immediately to cease its occasional deposition of ordnance in coastal waters surrounding the Island of Vieques, Puerto Rico, where the Navy lacked the necessary discharge permit under the Clean Water Act. The district court had directed the Navy to apply for such a permit but had declined to issue a prohibitory injunction in the interim. The court of appeals concluded that the Clean Water Act mandated issuance of an injunction requiring immediate cessation of military target practice. In our pending petition for a writ of certiorari, a copy of which, together with our reply memorandum, has been served upon petitioner herein, we contend (Br. 6-14) that the First Circuit decision represents an unwarranted extension of *TVA* v. *Hill*, *supra*, because, unlike the Endangered Species Act of 1973, the Clean Water Act does not assign an absolute priority to the requirements of the latter Act, and because the violation involved was merely technical and procedural, and would cause no irreversible change of conditions inimical to the policy of the Clean Water Act. We stress, however, (Br. 10-11) that injunctive relief is presumptively required to remedy violations of the Clean Water Act, and that, giving due regard to equitable principles, any remedy ordered must vindicate the legislative purpose and attain the requirements of the Act. Our contention is simply that the Clean Water Act does not preclude all consideration of equitable factors (see Reply Mem. 1). The same is true of the Clean Air Act, in our view. Yet the circumstances of this case are readily distinguishable from *Romero-Barcelo*. Here the district court gave petitioner ample opportunity to suggest an appropriate scheme and timetable for compliance. No request for a hearing was made when discussions between the parties

2. a. Petitioner contends (Pet. 16-21) that the court of appeals erred in holding that the operative date of the sulfur dioxide standard for the purpose of the definition of a "new source," Section 111(a)(2), 42 U.S.C. (Supp. III) 7411(a)(2) was August 17, 1971. It is alleged that the effect of the remand of the administrative record in *Essex Chemical Corp.* v. *Ruckelshaus*, *supra*, was to invalidate *sub silentio* the emission limit for sulfur dioxide and to remove the City's boiler from classification as a new source. Petitioner thus claims exemption from the standard on the theory that the boiler was constructed before September 10, 1975, the date on which EPA published its conclusion that the standard should not be revised. 40 Fed. Reg. 42045.

The court of appeals correctly held (Pet. App. A7) that the City's interpretation of the "new source" definition in Section 111 ignores the plain language of the statute. The statute provides that the publication date of proposed regulations prescribing a standard of performance for new sources is the date for determining whether a facility is a new source. Section 111(a)(2), 42 U.S.C. (Supp. III) 7411(a)(2). The statute does not provide that the date for determining whether a facility is a new source is the date when the validity of the published standard is finally determined by the highest available court. The actual wording of the statute cannot be ignored. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197-199 (1976);

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failed to produce the desired schedule. Nevertheless, the district court allowed a substantial open-ended grace period to petitioner for compliance. No more was required. The judgment of the court of appeals below is accordingly consistent with our position in *Romero-Barcelo*. Equity in no event requires the exemption from Section 111 that petitioner now seeks.

United States v. *Great Northern Ry.*, 343 U.S. 562, 575 (1952).[6]

b. Nor is there merit to the contention that the remand of the record by the court in *Essex* invalidated the emission standard for sulfur dioxide. 486 F.2d at 440, 441 n.51. The opinion states that "the record is remanded for further consideration and explanation by the Administrator." *Id.* at 441. The court took special care to emphasize that, in remanding, it "only want[ed] to be sure * * * that the administrator has acted reasonably in promulgating the standard." *Ibid.* n.51.[7] In so stating, the court referred to an earlier discussion in its opinion wherein the record underlying a companion performance standard was remanded. There the court explicitly stated, "[w]e do not intimate what should be done or necessarily that the current standard will have to be changed, but only that the record does not demonstrate adequate consideration of the issue." *Id* at 439 n.40. In sum, not a word in the opinion supports the conclusion that the court voided the SO_2 standard.[8]

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[6] Petitioner's suggestion (Pet. 20-21) that a new source performance standard can take effect only when it is clear that it will survive judicial review is irreconcilable with Congress's decision to subject sources constructed after a standard has been proposed but before final promulgation, to the standard. See 42 U.S.C. (Supp. III) 7411(a)(2).

[7] Petitioner's statement (Pet. 19) that the *Essex* court found the use of scrubbers "not to have been adequately demonstrated" is incorrect. Rather, the court stated that "the systems proposed are adequately demonstrated." 486 F.2d at 440.

[8] Subsequent developments confirm this reading of *Essex*. After EPA published its final decision not to revise the standard in light of the effects of scrubber sludge, a collection of

c. The result reached by the court below is supportable on an independent ground that EPA urged below, which neither court reached. Even on the City's theory that the *Essex* remand invalidated the sulfur dioxide standard, any such effect was limited to boilers using lime slurry scrubbers. In a later case seeking review of the same standard, *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F.2d 654, 656 (1975), the D.C. Circuit noted *Essex* had "approved" the standard insofar as it prescribed emission limits for sources capable of burning low sulfur coal, and described the standard as a subsisting one. *Id.* at 660. In this case, the United States made a showing, uncontested in the district court, that the City's

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electric utilities sought review of that decision. *Appalachian Power Co.* v. *Costle*, No. 78-1092 (D.C. Cir. Sept. 5, 1978). The court subsequently granted the utilities' motion for voluntary dismissal. *Ibid.* The court's order permitted the petition for review to be dismissed. Had the earlier remand invalidated the SO_2 standard, some further action of the court would have been required to permit the standard to take effect. Yet neither the utilities nor the United States suggested that any such formal act was required. Indeed, the utilities in their motion for voluntary dismissal repeatedly referred to the standard as the "current SO_2 standard." Since EPA had promulgated only one standard, and had done so in August 1971, it is clear that neither the parties nor the court had any reason to believe that the standard had been abrogated by the remand.

The District of Columbia Circuit has used this remand procedure in other Clean Air Act cases, noting the continuing validity of the regulation to be studied on remand. See, *e.g.*, *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 627, 649-650 (D.C. Cir. 1973); *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846, 850-851 (D.C. Cir. 1972); see Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 539-540 (1974). Nothing in the D.C. Circuit's *Essex* opinion suggests an intent to abandon this practice or provides reason for doing so.

boiler could comply with the sulfur dioxide standard by burning such low-sulfur coal (see J.A. 26). The *Essex* remand could accordingly have no effect on petitioner's boiler's status as a new source.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[9] EPA amended the fossil-fuel boiler standard in 1977 to codify the Agency's interpretation that boilers built after August 17, 1971, are new sources covered by the standard. On July 25, 1977, EPA promulgated 40 C.F.R. 60.40(c) which provides:

> [A]ny facility [boiler] * * * that commenced construction or modification after August 17, 1971, is subject to the requirements of this subpart.

42 Fed. Reg. 37936. Judicial review of this provision was available only in the D.C. Circuit within 60 days of its promulgation, under Section 307(b)(1) of the Act, 42 U.S.C. (Supp. III) 7607(b)(1). See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). Neither petitioner nor any other party availed itself of this opportunity.

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Petitioner's Reply Brief

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No. 81-164

Supreme Court of the United States

October Term, 1981

CITY OF PAINESVILLE, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. The government, apparently concerned by the strikingly parallel questions presented for review by it in the *Romero-Barcelo*[1] case and by Painesville in this case, has sought to distinguish the two cases in its brief opposing Painesville's petition (Op. Br.). The purported distinction, however, is unsupportable.

The government concedes (and, in *Romero-Barcelo*, asserts) that neither the Clean Water Act nor the Clean Air Act "preclude[s] all consideration of equitable factors," and that a district court, in fashioning a remedy for viola-

[1] *Romero-Barcelo* v. *Brown*, 643 F.2d 835 (1st Cir. 1981), petition for cert. filed by the United States on May 26, 1981, and pending in No. 80-1990; cited by the government in its opposing brief, page 10, n.5. The government's sole question presented for review is "[w]hether injunctions to require immediate cessation of discharges in violation of the Clean Water Act are mandatory under the standards articulated in *TVA* v. *Hill*, 437 U.S. 153 (1978), and not subject to the traditional equitable discretion of the district court." We commend to this Court the government's argument therein.

tions, must give "due regard to equitable principles" (Op. Br. 10). Curiously, while it opposes certiorari in this case, the government in the parallel *Romero-Barcelo* case, where the roles of the parties are reversed, has suggested that "[t]he Court may wish to consider summary reversal" (No. 80-1990, Pet. 16). The government attempts to distinguish *Romero-Barcelo* and this case on the bases that (1) Painesville never requested a hearing and (2) Painesville did not assert below that "it was unfairly surprised by the district court's action" (Op. Br. 5). Both bases are groundless.

A. The District Court issued the injunction, *sua sponte*, after its finding of liability and during a period of fruitless but continuing settlement negotiations. Nowhere in the record is there any indication that the Court advised the parties that it intended to issue an injunction or otherwise deal with the remedy issue without further hearing. Indeed, the issuance of the injunction came as a complete surprise to Painesville's trial counsel.

B. The government overlooks the fact that the issue of *remedy* was not before the district court at the time the injunction was issued. The case was decided upon the government's motion for summary judgment *as to liability*. The government did not request injunctive relief as a part of the summary proceedings but, on the contrary, advised the court that "[the question of remedy] is best left for later, since it appears that there is some disagreement between the parties as to facts relative to that issue and evidence may have to be taken by the Court" (Pet. 8, n.4). Thus, insofar as Painesville was apprised, the court had not been requested, and had not yet undertaken, to consider the issue of remedy. In this light, it cannot fairly be said that Painesville had either an obligation or even an appropriate opportunity to request a hearing on that issue. Indeed, in the face of the government's above-quoted assertion, it is disingenuous at best for the government

now to suggest that Painesville should have requested a hearing prior to the district court's order with respect to remedy. Surely the government would have been (justly) aggrieved had the court found Painesville liable but denied the injunction without taking evidence as to those equitable considerations the government would presumably urge in favor of an injunctive remedy.

C. Having neither the obligation nor the opportunity to request a hearing on the issue of remedy before the district court, Painesville properly raised this issue on appeal. Such an issue is not the sort contemplated by the *dictum* of *Hormel* v. *Helvering*, 312 U.S. 552 (1941) (cited by the government, Op. Br. 5) as being unreviewable when asserted for the first time on appeal. Because Painesville had no notice that the district court was actively considering the remedy issue until its surprise injunctive order of June 18, 1978, its first opportunity to raise the evidentiary hearing issue was on appeal of that order. Such an issue falls within the category recognized by the *holding* in *Hormel* as being reviewable on appeal, even though unasserted below. It is obviously for this reason that the court of appeals in this case did consider Painesville's appeal of this issue despite a similar assertion by the government at that time.

2. At page 8 of its opposing brief, the government argues that the Clean Air Act "leaves no room for the far-ranging, unstructured reexamination of policy considerations, including those unrelated to the objectives of the Clean Air Act, proposed by petitioner." We have reviewed the government's petition in the *Romero-Barcelo* case and we fail to see how the "significant and exceptionally strong equitable considerations" urged there (p. 13, 14) are any more related to the objectives of the Clean Water Act than are the equitable considerations asserted by Painesville related to the Clean Air Act. On the contrary, and apparently overlooked by the government, the equitable con-

siderations which should have been weighed by the district court in this case include those intimately related to the fundamental purpose of the Clean Air Act; in particular, the substantial possibility that the district court's injunction could actually lead to an *increase* in air pollution (Pet. 15, 21-22). As the government recognizes, the purpose of the statute that the injunction would enforce (Section 111 of the Clean Air Act) is to "[prevent] less polluted states from attracting industry with more lenient state pollution standards . . ." (Op. Br. 7). Such purpose is not furthered by imposition of new source performance standards on a municipal electric power plant, the situs of which is fixed. Accordingly, such equitable considerations bearing upon the overriding objective of the Clean Air Act (cleaner air) should weigh most heavily in the district court's decision as to the proper remedy.

3. The government either misinterprets or misrepresents Painesville's position with respect to the effect of the *Essex* remand upon the effective date of the sulfur dioxide emissions standard. Painesville does not argue, as asserted by the government, "that the effect of the remand of the administrative record in *Essex Chemical Corp.* v. *Ruckelshaus,* [486 F.2d 427 (D.C. Cir. 1973], was to invalidate *sub silentio* the emission limit for sulfur dioxide . . ." Rather, Painesville submits that the import of the *Essex* remand (especially when viewed in the light of the response to the remand) is that the control technology (scrubbers) underlying and defining the emissions standard had not been demonstrated (and was not subsequently demonstrated) to be environmentally sound at the time the emissions standard was proposed. Only at such time as the control technology was demonstrated to be environmentally sound could its use be mandated and the resultant emissions standard be imposed.

4. Painesville suggests that the government's experience in *Romero-Barcelo* serves to highlight the importance of the issues raised in the City of Painesville's petition for

certiorari. Although the government seeks to minimize the point in its brief in opposition, it is inescapable that the government in *Romero-Barcelo* stands in much the same position as the City of Painesville stands in this case. Thus, once one has brushed aside the government's transparent efforts to distinguish the two cases, it is clear, we submit, that these cases present, in the context of parallel environmental enactments, the same issue regarding the extent to which the district court should observe traditional practices of equity and give consideration to long-standing equitable principles in fashioning a remedy for violations of those statutes. In this light, although the petitioner believes that the issues presented in its petition are themselves worthy of this Court's valuable time and consideration wholly apart from the disposition of *Romero-Barcelo*, we respectfully suggest that, if the Court determines to grant the government's petition in that case, it would seem appropriate likewise to grant the City of Painesville's petition so as to resolve these important questions for purposes of both the Clean Air Act and the Clean Water Act. In that event, the Court may wish to consider the cases in tandem. Certainly, Painesville should be entitled to no less favorable consideration than that ultimately accorded the government in *Romero-Barcelo*.

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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